Lincoln Hills Nursing Home, Inc.; Leaseholding Company; and Tell City Distributors (Joint Employers) *and* Chauffeurs, Teamsters and Helpers Local Union No. 215, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 25-CA-9432

September 3, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On December 7, 1978, Administrative Law Judge Norman Zankel issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and briefs, and Respondent filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Lincoln Hills Nursing Home, Inc.; Leaseholding Company and Tell City Distributors, Tell City, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

MEMBER JENKINS, dissenting in part:

Contrary to my colleagues and the Administrative Law Judge, I would find that Respondent violated Section 8(a)(1) of the Act by withholding vacation or sick benefits from reinstated strikers Dickman and Holmes until they made up the worktime they missed during a strike.

The facts show that Dickman and Holmes participated in an economic strike against Respondent from April 29 to July 29, 1977, and were thereafter reinstated to their jobs in August. In mid-September, Dickman's 42d month of employment with Respondent and 12 months after her previous vacation, Dickman requested vacation leave and was told that she would first have to make up her worktime missed during the strike. Dickman did so and subsequently received her full vacation benefit. Thereafter, Holmes in April 1978, her 25th month of continuous employment with Respondent, made a similar request and got the identical response. Holmes reacted by resigning without giving advance notice, and was not paid for her unused vacation or sick days.[3] Ambrose, Respondent's administrator, testified that the responses to the requests by Dickman and Holmes accurately reflected Respondent's actual prior practice of crediting employees with vacation hours after a full year's work.[4] Applying this policy in other situations, such as one where employees are absent from work for extensive periods of time due to illness, one would think that they likewise would be ineligible for vacation benefits because they also did not meet the requirement of a "full year's work." However, Ambrose testified that this type of situation would require a managerial decision, and added, "if somebody is off sick I am not going to jerk anybody around, if they have the doctor's excuses to supply." Based on Ambrose's testimony concerning Respondent's practice, which was uncontradicted, the Administrative Law Judge found, and the majority now agrees, that the General Counsel failed to prove that Respondent's withholding of benefits based on its exclusion of strike time from computation of those benefits was discriminatorily motivated; i.e., for the purpose of penalizing them for their strike activities. I disagree for the following reasons.

[1] We accept the Administrative Law Judge's dismissal of complaint allegations based on the withholding of vacation benefits from strikers. The uncontroverted testimony of Respondent's administrator shows that it was Respondent's practice to compute eligibility for vacation benefits upon a year's actual work and not simply upon a year's tenure of employment. Unlike our dissenting colleague we do not read Respondent's written benefit policy making eligibility dependent upon "one full year" with Respondent to be clearly contrary to this practice. Nor do we think a finding of disparate treatment of strikers is warranted because Respondent on occasion might allow time lost due to sickness to be counted toward vacation eligibility.

[2] We find that Respondent, by its unlawful withdrawal of recognition of the certified bargaining representative, its refusal to reinstate a substantial number of strikers, and the other violations found herein, has demonstrated a general disregard for its employees' fundamental statutory rights. We view the aforesaid conduct as sufficiently severe to warrant the imposition of the broad remedial order recommended by the Administrative Law Judge, which we shall accordingly adopt. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[3] Respondent's published vacation and sick policies provide for payment upon termination of any unused vacation time, and unused sick leave at half credit, on condition that *2 weeks' notice* is given to Respondent.

[4] Ambrose's testimony was elicited by Respondent's counsel to explain how Respondent's practice may have differed from Respondent's written leave policies, which provide in pertinent part as follows:

> *VACATIONS*
>
> AN EMPLOYEE WHO HAS *BEEN WITH THE COMPANY FOR ONE FULL YEAR*, SHALL QUALIFY FOR A PAID VACATION IN THE MANNER SET FORTH BELOW:
>
> One year = 40 hours vacation time . . . . [Emphasis supplied.]

It is clear from the "with the Company for one full year" clause in Respondent's published leave policy that vacation benefits are keyed to tenure of employment rather than to a *work* requirement, and thus the General Counsel, by introducing the written leave policy into evidence, has established *prima facie* that Dickman and Holmes met Respondent's qualifications for vacation benefits. Respondent's rebuttal evidence, consisting solely of Ambrose's self-serving, albeit uncontradicted, statement of Respondent's work requirement in practice, lacks corroboration or any showing that employees were even aware of such an alleged practice. In these circumstances, I find that the Respondent has failed to overcome the presumption that Respondent's published leave policy, which is clear and unambiguous on its face, was and is the policy in actuality. In my view, the record evidence shows that Respondent's denial of benefits to Dickman and Holmes was contrary to its own policy and practice.

Further, even accepting the assumption that Respondent's leave policy was predicated on *work* rather than *tenure*, there is nonetheless a violation on the basis of Respondent's own evidence. Thus Ambrose's own testimony relating to absences due to illness shows clearly that they would not cause a loss of vacation pay, and thus establishes that Respondent applied its alleged "work" requirement in a disparate manner to the disadvantage of strikers. See *Russell Sportswear Corporation*, 197 NLRB 1116, 1121 (1972).

I therefore conclude that Respondent's withholding of benefits—in consequence of the strike activities of Dickman and Holmes—was inherently destructive of their Section 7 right to engage in protected concerted activities, and thereby violated Section 8(a)(1) of the Act, irrespective of Respondent's intent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties had the opportunity to present their evidence, it has been decided we violated the law in certain respects. We have been ordered to post this notice. We intend to carry out the order of the Board and abide by the following:

The National Labor Relations Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives whom they themselves select

To engage in activities together for purposes of collective bargaining or to act together in order to seek improvement in their wages, hours, working conditions, and other terms and conditions of employment

To refrain from any and all such activities.

WE WILL NOT give job preference to strike replacements over former strikers.

WE WILL NOT unlawfully hire new applicants for employment before offering reinstatement to employees who were on strike April–July 1977 and who applied for reinstatement.

WE WILL NOT change the job of any nonstriker so as to discriminate against anyone who was on strike during April–July 1977.

WE WILL NOT refuse to bargain collectively in good faith with your Union, Chauffeurs, Teamsters and Helpers Local Union No. 215, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as your exclusive bargaining representative with regard to wages, hours, working conditions, and other terms and conditions of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce any of you in the exercise of any and all of the rights described at the top of this notice.

WE WILL offer each striker against whom we have been found to have discriminated full and immediate reinstatement to his or her former job or, if that job no longer exists, to a substantially equivalent position of employment, without prejudice to his or her seniority or other rights and privileges previously enjoyed; and WE WILL make each striker whole for any loss of pay suffered as a result of the discrimination against her or him, with interest.

WE WILL, upon request, recognize and bargain collectively with your Union which represents the employees in the appropriate unit described below, with regard to your wages, hours, working conditions, and other terms and conditions of employment, and, if an understanding is reached, WE WILL embody such understanding in a signed agreement if requested. The appropriate bargaining unit is:

All service and maintenance employees, including licensed practical nurses, nurses aides, charge aides, orderlies, physical ther-

apy aides, kitchen employees, activities employees, social designee, housekeeping employees, and laundry employees who are employed by us at our Tell City, Indiana, facility, excluding all office clerical employees, all professional employees, all registered nurses, director of nursing, assistant director of nursing, the dietary manager, all guards, and all supervisors as defined in the National Labor Relations Act as amended.

LINCOLN HILLS NURSING HOME, INC.; LEASEHOLDING COMPANY; AND TELL CITY DISTRIBUTORS

DECISION

STATEMENT OF THE CASE

NORMAN ZANKEL, Administrative Law Judge: This case was heard before me in Tell City, Indiana, on June 20 and 21 and July 10 through 13, 1978.

Upon a charge filed by Chauffeurs, Teamsters and Helpers Local Union No. 215, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter called the Union), on November 16, 1977,[1] a complaint and notice of hearing was issued on January 31, 1978, by the Regional Director for Region 25 of the National Labor Relations Board (hereinafter the Board) against Lincoln Hills Nursing Home, Inc.; Leaseholding Company; and Tell City Distributors (hereinafter jointly called the Employer).

In essence, the complaint alleges that the Employer discriminated against employees in violation of Section 8(a)(3) of the National Labor Relations Act, as amended (hereinafter the Act), by having failed to reinstate strikers at, and after, the conclusion of the strike in which they participated. By virtue of oral amendments at the hearing, the complaint alleges the Employer discriminated against strikers in other miscellaneous respects. Additionally, the complaint alleges that the Employer refused to bargain collectively with the Union in good faith in violation of Section 8(a)(5) of the Act by engaging in dilatory bargaining tactics, by refusing to sign an agreement reached between the Employer and Union, and by unilaterally withdrawing recognition from the Union as the collective-bargaining representative of an appropriate unit of employees.

The Employer's timely amended answer to the complaint, while admitting certain allegations, denies the commission of any unfair labor practices. All issues were fully litigated at the hearing; all parties were represented by counsel and were afforded full opportunity to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, and to engage in oral argument. Post-hearing briefs were received from counsel for the General Counsel, counsel for the Employer, and the Union's counsel. These briefs have been carefully considered.[2]

Upon the entire record, my observation of the witnesses and their demeanor in the witness chair, and upon substantial, reliable evidence, "considered along with the consistency and inherent probability of testimony" (*Universal Camera Corporation* v. *N.L.R.B.*, 340 U.S. 474, 496 (1951)), I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Each of the entities named as a joint employer has at all times material herein been an Indiana corporation. The Employer has at all times material maintained its principal office and place of business at Tell City, Indiana, where it has been, and is, engaged in the operation of a nursing home providing and performing health care and related services.

During the 12-month period immediately preceding the issuance of the complaint, the Employer performed services in excess of $100,000 gross value. During the same period of time (a representative period), the Employer received goods valued in excess of $50,000 at its Tell City, Indiana, location directly from States other than Indiana.

The Employer admits, the record reflects, and I find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Additionally, the Employer admitted, the record reflects, and I find that at all times material herein each of the joint employers constitutes a single integrated business enterprise, based on the admission that they operate with common officers, ownership, directors, and operators; and because it is admitted that the directors and operators formulate and administer a common labor relations policy for each of the joint employers which affects their employees.

II. THE LABOR ORGANIZATION INVOLVED

The parties agree, the record reflects, and I find that the Union has at all times material herein been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The alleged unlawful conduct emanates from the Union's efforts to negotiate a first-time collective-bargaining agreement on behalf of the employees in an appropriate bargaining unit.

On November 21, 1976, the Union was certified as the collective-bargaining representative of all the Employer's

[1] All dates are in 1977 unless stated to be otherwise.

[2] After the hearing closed counsel for the General Counsel submitted a "Motion to Receive Exhibit After Hearing Closed." Inasmuch as this motion is unopposed it is hereby granted. Accordingly, the document marked as G.C. Exh. 68, attached to the motion, is received in evidence and has been attached by me to the formal exhibits contained in the official record. Also, the Employer later filed a motion to reopen the record which is disposed of hereinbelow.

service and maintenance employees as a result of a Board-conducted election.[3]

The parties held their first bargaining session on January 4. Seven bargaining sessions were held between that date and April 29 when a strike ensued. It is undisputed that the strike was economic in character. The strike continued until July 29. On that date the Union delivered "an unconditional application for reinstatement" on behalf of 80-named employees. The Union's letter as an effective unconditional offer to return to work is unchallenged. Indeed, the Employer's administrator, Roger Ambrose (immediately upon receipt of the Union's letter), established recall procedures. These procedures included, *inter alia*, sending recall letters which, in salient part, acknowledge that the Employer has communicated with the employee "pursuant to your unconditional offer to return to work . . . ." Upon the foregoing, I find the Union's July 29 letter to constitute an unconditional offer to return to work on behalf of the employees named in it.[4]

Uncontradicted testimony of Ambrose and Nina Lemaire, the Employer's health services supervisor, reflects that the Employer hired certain individuals during the strike to perform the strikers' regular services. The uncontroverted testimony is to the effect that those employees hired during the course of the strike were explicitly informed they were being hired into permanent positions. As an example, each nurses aide hired on an on-call basis[5] were advised they would be moved into permanent part-time positions and elevated into full-time jobs as vacancies occurred. Based on the foregoing, I find that each individual hired into a unit position while the strike was in progress was a permanent replacement for a striker.

Before the strike the Employer was operated as a skilled/intermediate care facility of approximately 165 beds. Average occupancy was approximately 130 patients dispersed among four wings of the facility. A fifth wing housed the Employer's administrative functions.

Ambrose became the Employer's administrator in February 1977. He and Lemaire share responsibility for day-to-day operations. Ambrose directs the activities of the maintenance, laundry, food service, social activities, and physical therapy sections. Lemaire has overall responsibility for the operation of the Employer's health services. The Employer admitted and, based upon the record I find, that Ambrose and Lemaire are supervisors within the meaning of the Act. Additionally, I find that attorney Gerald R. Cureton was the Employer's attorney and agent at all material times.

B. *The Refusals To Bargain*

The complaint alleges the Employer refused to bargain in good faith in three separate ways: (1) By engaging in dilatory tactics demonstrating general bad faith (complaint par. 7(a)); (2) by refusing and failing to sign a contract embodying the agreements reached during negotiations (complaint par. 7(b)); and (3) by unilaterally withdrawing recognition form the Union (complaint par. 7(c)).

1. Dilatory tactics

Although the complaint alleged that the Employer engaged in general bad-faith bargaining since May 16, the General Counsel disclaimed reliance on that date. Instead, the General Counsel's theory of violation is focused on the Employer's bargaining tactics within later phases of negotiations. The General Counsel relies on the Employer's "failure to keep the Union posted with regard to the progress made in . . . [its] dealings with the State [of Indiana], concerning the increase in the financial assistance or contribution the State is making to . . . [the Employer's] operation . . . ." The Employer claimed it could not intelligently prepare a wage proposal because it needed to know the degree to which the State would render financial assistance to its operations and because it needed to evaluate the impact of the Federal Minimum Wage Law which had been pending for congressional action during the course of the collective-bargaining negotiations.

The last bargaining session involving in-person presence of the Union and the Employer negotiators occurred on October 4. Since the inception of negotiations, Cureton was the Employer's principal spokesman. Although Union Attorney Anne C. Thomas attended the meetings, the Union's principal spokesman was Charles McDonald, its vice president-business representative.

Between October 4 and November 29, the parties communicated with one another through a series of 11 letters and 5 telephone conversations, as will be described in detail, *infra*, within the discussion of the alleged refusal to sign a contract. A review of the various conversations and contents of the letters in evidence shows that the collective-bargaining process was a continuing event although the parties did not personally meet together. It is noted that none of the total of 16 communications contains a request by either party to convene a meeting. Analysis of the documents and all testimony concerning the telephone conversations shows a dialogue of discussion upon subjects relevant to the negotiations. Whenever the Union questioned the Employer's position, clarification was forthcoming. As will be seen in greater depths hereinbelow, the communications subsequent to November 3 reveal the principal subject under consideration was the status of the wage proposal and whether, in fact, there was in existence a complete collective-bargaining agreement requiring the Employer's signature.

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[3] Based on the record as a whole I find the following unit in which the election had been conducted constitutes a unit appropriate for collective-bargaining purposes within the meaning of Sec. 9(b) of the Act:

> All service and maintenance employees, including licensed practical nurses, nurses aides, charge aides, orderlies, physical therapy aides, kitchen employees, activities employees, social designee, housekeeping employees, and laundry employees of the Employer at its Tell City, Indiana facility, excluding all office clerical employees, all professional employees, all registered nurses, director of nursing, assistant director of nursing, the dietary manager, all guards, and all supervisors as defined in the Act.

[4] Implementation of the recall procedures will be discussed *infra*.

[5] "On-call" employees are assigned no regular shift. Rather, such employees are called to work as needed and work at any time during the Employer's round-the-clock operations.

The General Counsel argues that the record demonstrates the Employer withheld critical wage knowledge in its possession from the Union in order to permit the certification year to expire before the parties could come to complete economic terms. I disagree. Initially, I note that there is no evidence that the Union specifically requested the information, the transmission of which it is alleged was intentionally delayed. Next, the documentary evidence relied on by the General Counsel (specifically a letter dated November 21, Resp. Exh. 32) was the first advice to the Employer that its requested rate change had been approved. There is no evidence of the date the Employer received the November 21 letter.

By letter dated November 17, Thomas submitted to Cureton a wage proposal intended to be considered in connection with the newly enacted Federal Minimum Wage Law. Thomas requested Cureton to communicate with the Union to arrange a meeting to discuss her proposal. Neither Cureton nor any other Employer representative responded to Thomas' November 17 letter.

The General Counsel's argument requires me to impose an obligation upon the Employer to have arranged the requested meeting virtually simultaneous with receipt of the November 21 letter advising of the rate change approval. I am unwilling to do so. November 21, 1977, fell on the Monday immediately prior to Thanksgiving. The letter was addressed to Ambrose at the Employer's facility. Assuming the letter had been immediately dispatched in the mails, it could not have been received by Ambrose earlier than a day or two before Thanksgiving. Because Cureton was the Employer's negotiating spokesman, Ambrose (in Tell City, Indiana) surely would have had to communicate the information contained in the letter to Cureton (in Philadelphia, Pennsylvania). The Employer's letter withdrawing recognition was written on the following Tuesday. In my view, adoption of the General Counsel's contentions, in this chronological framework, provides the Employer with insufficient time (in the entire context as will be developed herein) for analysis of the Union's November 17 proposal in relation to the Employer's newly approved rate change. In sum, I conclude it would be straining to find the Employer delayed collective bargaining on the grounds proposed by the General Counsel. I conclude the totality of the Employer's conduct during the final phases of negotiations does not meet the tests of illegality set forth in *N.L.R.B.* v. *Benne Katz, etc., d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736 (1962). Accordingly, I find that the facts do not support the allegations contained in paragraph 7(a) of the complaint by a preponderance of the evidence.[6]

2. Refusal to sign

This allegation is predicated upon the General Counsel's assertion the parties had reached agreement upon all contract issues by virtue of a union ratification meeting conducted on November 3. It is uncontested that the Employer was requested to sign a contract on November 4 and, at all times since, has refused to do so.

The Employer contends there had been no mutual agreement upon wages at the time the union membership took its ratification vote. Specifically, the Employer argues the interjection of the new minimum wage legislation signed into law on November 1, to be effective January 1, 1978, effectively vitiated the Employer's then pending wage proposal made on October 5. That Employer proposal is contained in a letter dated October 5 (to be discussed below) from Cureton to Thomas and McDonald.

A synopsis of the negotiations is necessary to resolve the instant issue. The evidence as to what transpired during the negotiations was presented by Thomas and Cureton,[7] each of whom I credit. There was no material difference between their versions of material facts, some of which is supported by documentary evidence, admissions and factual stipulations. The ultimate choice in making my findings of fact throughout this Decision is based, additionally, on my observation of the demeanor of the witnesses, the weight of the respective evidence provided by them, inherent probabilities and reasonable inferences which may be drawn from the record as a whole. *Northridge Knitting Mills, Inc.*, 223 NLRB 230 (1976); *Warren L. Rose Castings, Inc. d/b/a V & W Castings*, 231 NLRB 912 (1977); see also *Gold Standard Enterprises, Inc.*, 234 NLRB 618 (1978).

Regarding wages, in bargaining sessions prior to October 4, the Union suggested that negotiations proceed upon the then pending FLSA legislation which, according to reports, was designed to raise the minimum wage to $2.65 per hour. At that time the lowest paid unit employee was receiving $2.35 per hour. The Employer expressed a willingness to negotiate wages in accordance with the minimum wage then actually in existence. It declined, however, to accede to the Union's request, claiming that the anticipated legislation was too speculative a basis for bargaining purposes. Nonetheless, the Employer agreed that if the parties successfully concluded a wage package before the new minimum wage was enacted then the negotiated wage agreement would automatically be subject to reopening by operation of the savings clause upon which there was no apparent dispute for inclusion in the contract. It is undisputed that by the conclusion of the October 5 bargaining session tentative agreements had been reached upon substantially all contract issues except wages. The events described below comprise the relative activity based on the foregoing backdrop.

October 4: The parties met. Cureton and Ambrose represented the Employer. Thomas and McDonald together with several employees represented the Union.

Despite the Employer's position that it would negotiate only on the current minimum wage, the Union had

[6] In any event to find a violation upon the dilatory conduct theory would not enhance the nature of the bargaining order remedy which I shall provide, *infra*, to rectify what I shall find was an unlawful withdrawal of recognition from the Union.

[7] At the time of their testimony, Cureton was not the attorney-of-record for the Employer, but Thomas appeared as the Union's attorney. Under Board precedent, I find no impropriety in Thomas' appearance as a witness. *Local Union No. 9 of the International Union of Operating Engineers (The Fountain Sand & Gravel Company)*, 210 NLRB 129, fn. 1 (1974).

nonetheless modified its wage proposal in accord with the not-yet-enacted FLSA minimum wage. Thus, the Union had proposed a 30-cent across-the-board increase for all unit employees. Also, the Union proposed to reopen wages for negotiations in each of the second and third years of the proposed contract. The Union's proposal would have brought the lowest paid employee from $2.35 to $2.65 per hour. The Employer rejected this proposal.

The Employer counterproposed by offering a 5-cent increase in the third year. These increases were based on the current wage rates enjoyed by unit employees.[8] In connection with the pending minimum wage legislation, Cureton maintained his position that, pursuant to the savings clause, wages would have to be reopened in the event the new minimum wage rate would be higher than that which was negotiated.

This negotiating session ended without agreement on wages.

Immediately after the meeting Thomas and McDonald conferred with the employee committee. According to Thomas who was uncontradicted on this point, the union committee decided to accept the Employer's wage offer. They also agreed to submit the entire contract proposal to the union membership. This "ratification" was conducted in two sessions on November 3. The record does not reveal the precise time that date had been selected.

October 5: Cureton called McDonald. Cureton orally submitted an amended wage proposal on behalf of the Employer. Thus, Cureton proposed across-the-board increases of 5 cents in each of the first two contractual years and 10 cents in the third year.

Also, on October 5, Cureton confirmed that telephone conversation by letter to McDonald and Thomas. In salient part, the letter stated:

> In an effort to conclude the negotiations with a collective-bargaining agreement that is mutually satisfactory we [the Employer] make the following modification in our proposal:
>
> (1) Across-the-board 5-cent raise during the first year of the contract.
>
> (2) Across-the-board 5-cent raise in the second year of the contract.
>
> (3) Across-the-board 10-cent raise in third year of the contract.
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> (4) We will tie our uniform allowance provisions to any employee earning 10 cents or less over the then prevailing legal minimum wage.

October 10: Thomas and Cureton spoke on the telephone. Cureton wrote Thomas on the same date in confirmation of that conversation.

After discussing matters relative to recall of strikers, Cureton's October 10 letter contains clarification of the Employer's oral and written revised wage proposal of October 5. Cureton explained that the October 5 offer constituted "an increase from . . . [the Employer's] prior offerings in the following respect: We had earlier withdrawn the second year raise. We now offer a second year raise of 5 cents. We then increased our third year offer to 10 cents. Our increased uniform allowance is self-explanatory."

As to the effect of the pending minimum wage legislation, Cureton noted that Thomas had inquired (during their telephone conversation that day) how the Employer's offer would be affected by the proposed $2.65 minimum. Cureton responded that "the savings clause of the contract provides that clauses which are superseded by law are unenforceable. We would then renegotiate wage rates in light of the changed minimum wage."

October 20: Thomas wrote Cureton questioning the transfer of a "scab" kitchen employee into a laundry vacancy.

In this letter Thomas asked for contract language on wages to assure the Union no one would suffer a reduction.

October 31: Cureton wrote to Thomas to respond to her October 20 letter. After providing the Employer's explanation for the kitchen-laundry transfer and claiming the Employer acted properly in that connection, Cureton responded to Thomas' concern that no one would suffer a wage reduction. His letter states that no employee will receive less than his or her current wage. Regarding Thomas' request for wage language, Cureton responded, "I believe that . . . [the Employer's offer] regarding wages is clear and concise. If you wish to submit additional language to clarify any difficulty you . . . [the Union] have I will of course be receptive to such proposals."

November 2: Thomas called Cureton. As previously indicated I find Cureton and Thomas fully credible. The conversation held this date is critical to resolution of the issues. In many respects the versions provided by Cureton and Thomas are mutually corroborative. I find Cureton's account more comprehensive than Thomas'. Neither denied the version presented by the other. Upon the foregoing, my description of the telephone conversation is a composite of the testimony provided by those two witnesses. Thus, I find the November 2 conversation occurred as follows:[9]

First, there was a discussion concerning the kitchen-laundry transfer.

As to the wage proposal, Thomas asked whether the first year 5-cent increase was intended as an across-the-board increase or whether the Employer was proposing a separate rate for each classification. Cureton responded (consistent with the language of his October 5 letter) that it would be across the board.

Thomas then advised Cureton that President Carter signed the minimum wage bill on November 1. Cureton said he was unaware of that fact. He told her he would look into it. Cureton's uncontradicted testimony is to the effect that after his investigation he told Thomas he would "give another proposal" (on wages).[10] Cureton

[8] The 5-cent increase proposed for the first year had already been implemented by the Employer during the strike. The Employer's action is not the subject of any unfair labor practice allegation herein.

[9] The General Counsel's brief concedes that "there is no substantial conflict between Thomas' and Cureton's testimony . . ." of their November 2 telephone conversation.

[10] Thomas was not asked to deny this assertion by Cureton.

also said he would check to find out how much of the new minimum wage the Employer could pass to the state.

Thomas asked Cureton whether he could conduct his investigation and advise her whether he had any new wage proposal the following day. Cureton responded that he would make efforts to communicate with the necessary people that very day but cautioned he might not be able to reach them. Cureton said he was "not sure" if he could reach the Employer's principals in time to contact Thomas the next day. Additionally, he told Thomas he wanted to read the new minimum wage law and that would take some time. Finally, Cureton said, "I can't get back to you tomorrow [November 3]. I'll try Friday, but more probably Monday at the earliest. Even then it would be tough."

There is no evidence that, during this conversation, Thomas advised Cureton of the "Union ratification" meeting scheduled for November 3. Also there is no evidence that Cureton made any effort to communicate with Thomas again on November 2 or at any time on November 3.

November 3: The Union conducted its "ratification" meeting. All tentative agreements were submitted to, and approved by, the members in attendance. Also submitted for their consideration was the Employer's October 5 wage proposal. This, too, was approved by the membership.

November 4: Thomas called Cureton. Thomas told Cureton, "You have a contract." He asked her to explain that comment and Thomas advised that the membership voted to ratify all the tentative agreements together with the wage proposals then on the bargaining table. Thomas testified that Cureton protested that he had advised her during their November 2 telephone conversation that the Employer's offer was no longer valid.

Thomas' narration of the November 4 telephone conversation was general and brief. Additionally, during cross-examination, she acknowledged she did not recall the entire conversation. Accordingly, the following findings as to what was said during this conversation is derived from Cureton's more direct, explicit, and uncontroverted recount.

Relative to what Thomas described as Cureton's protest of the Union's action, Cureton said, "I was preparing a new wage proposal and you knew that. What are the wages in this new contract you have?" Thomas responded, "Your old wages." Cureton asked, "What about the minimum wage law. That invalidated those wages we were proposing and we are preparing a new proposal." Thomas insisted, "The membership voted on it." Cureton protested, "[T]he negotations are between the Company and the Union—not between the Union and its members. I am not bound by what the membership does." Thomas insisted, "Well, we have a contract." Cureton retorted, "I don't think we do until we get the wages straightened out."

Thomas then suggested the savings clause would cure any impediment. Cureton opined that a savings clause could not be used to make lawful that which is unlawful at the time of contract execution. Thomas observed that the new law was not effective until January 1, 1978, and insisted there was a contract between the parties. Cureton accused the Union of engaging in a refusal to bargain, commenting that he thought the Union's tactic was a way to circumvent the Employer's previous rejections of wage reopeners.

Cureton suggested that they call the situation a misunderstanding. Thomas said a contract was on its way to him for the Employer's signature. Cureton said he would treat the document sent by Thomas as a proposal for wages and he would counterpropose.

By letter dated November 4, Thomas wrote Ambrose that on November 3 "the Employer's final offer was accepted in a secret ballot vote." Enclosed were copies of the agreement which the Union prepared. Thomas requested Ambrose review the document, and obtain the necessary Employer signatures. On the same day Thomas wrote Cureton forwarding a copy of Thomas' letter to Ambrose together with a copy of the agreement for Cureton's review. In this letter Thomas advised Cureton that "the Union proposes an effective date of November 3, 1977 and a termination date of November 2, 1970." She asked Cureton to insert the dates on the contract.

Also, Cureton wrote Thomas and McDonald on November 4. Cureton confirmed his November 4 telephone conversation with Thomas "regarding the effect of the minimum wage increase just signed into effect." Cureton advised that the Employer's wage offer "is invalidated by the new minimum wage law. We are, therefore, re-evaluating our financial situation in this light, and will have a new proposal for you in the next few days." Cureton also agreed to schedule a meeting with the Union as soon as the Employer had prepared its new proposal.

November 8: Thomas wrote Cureton. First referring to the November 4 telephone conversation between those two attorneys, Thomas claimed Cureton "did not withdraw the [October 5 offer] that was on the table nor did . . . [he] tell [Thomas]" that the Employer would be making new proposals. Thomas stated it was her recollection that Cureton advised her he was not aware the minimum wage law had been signed and that he "would have to verify that fact." Further, the letter comments "only after [Cureton] learned that the employees had accepted your offer did you state that your final offer was no longer on the table."

Thomas also claimed that, although the Union had raised the "minimum wage contingency" during negotiations, "the Company chose not to deal with that issue." Thomas asserted that the documents forwarded to Cureton on November 4 "was not a proposal but was, instead, the agreement reached between the parties, based upon the Company's final economic offer of October 5, 1977." Thomas' letter ended inviting Cureton to communicate with her regarding any questions he may have and requesting him to obtain the Employer's signature on the contracts.

November 9: Cureton wrote Thomas responding to her November 4 letter to him. He acknowledged receipt of a copy of the "contract." After expressing his consternation at the events of the preceding week, Cureton stated that he was "in the process of preparing a new wage

proposal for the Union." Cureton wrote that Thomas knew this on November 2 "when [Cureton] told [Thomas] so" during their November 2 telephone conversation. This letter reiterates that Cureton "made it clear that the prior proposals had become invalid as a result of the new law." Further, Cureton wrote he could not understand why Thomas had presented the Union membership with an "outdated, invalid" wage proposal. He surmised that the Union's motivation was to "use the new minimum wage law as a lever to reopen all wages immediately upon signing the contract." Cureton commented that he "would have no problem with this if it were done prior to enactment of the new minimum wage law. In fact, I [Cureton] alluded to this in a letter prior to enactment of the minimum wage law. It is impossible to use a savings clause for the sole purpose of a wage reopener. An illegal wage rate is just that, and a savings clause will not cure it." Cureton contended that the "contract" forwarded by Thomas contains "no lawful wage rate *ab inito*. Hence, there can be no agreement."

Next, Cureton's November 9 letter indicates that the Employer considers the wage issue "vitally important." He indicated that the new minimum wage "may have spillover effects into other economic aspects of the contract. . . ."

Cureton ended this letter repeating he would treat the document forwarded by Thomas as a counterproposal. He requested that the Union now supply him "with a wage proposal that complies with the new minimum wage law."

November 10: Cureton wrote Thomas advising her that he had completed his review of the document forwarded to him on November 4. He advised that all matters contained in the document were satisfactory to the Employer, except for wages. Cureton wrote "since wages are the heart of any collective-bargaining . . . I feel it is imperative that we resolve the economic issues in light of the new minimum wage, and that we do so as soon as possible."

Cureton wrote that the Employer is preparing its wage proposal. He outlined, in some detail, the Employer's concern that Indiana would not absorb the entire financial impact of the minimum wage law. Thus, he advised the Employer currently was undertaking a cost analysis of the new minimum wage.

Cureton asked Thomas to have the Union supply him with a new wage proposal "as soon as possible. . . ."

November 17: Thomas wrote Cureton in response to Cureton's November 9 and 10 letters.

First, Thomas noted the effective date of the new minimum wage law is January 1, 1978. Thus, Thomas protested there is no substance to Cureton's claim that the wages contained in the Union's November 4 "contract" are void *ab initio*. Thomas claimed that those wages now must be "renegotiated under the savings clause prior to January 1, 1978."

Next, Thomas' November 17 letter responded to Cureton's recent request for a new wage proposal by setting forth two alternative wage proposals. The first proposal called for an across-the-board 30-cent increase over the employees' current wages to be "effective immediately, with wage reopeners in 1978 and 1979." The alternative proposal requested an immediate 30-cent increase for all employees, a 25-cent increase "effective November 4, 1978," and a 20-cent increase "effective November 4, 1979."

Finally, Thomas reiterated her position that the parties "have reached an agreement and . . . have a contract." Thomas' letter ended by requesting Cureton to communicate with her or McDonald to arrange a meeting. Also Thomas requested the Employer return signed copies of the "contract" to her.

As previously noted, the Thanksgiving holiday was observed during the very next week after this final letter from Thomas to Cureton.

November 29: Cureton wrote Thomas. This letter completes the sequence of events relative to the collective bargaining between the parties. Additionally, it forms the basis of the alleged unlawful withdrawal of recognition. Thus, the full text of the letter appears, as follows:

> Dear Ms. Thomas:
>
> I bring to your attention the *enclosed documents* we recently received in which a substantial number of our employees have declared their desire to no longer be represented by Local 215. Because this "*petition*" is signed by a majority of our employees, I am in a difficult position of having to *withdraw recognition* from Local 215 until this matter is resolved. As you know, it would be an unfair labor practice for me to continue negotiations with a union that represents only a minority of bargaining unit employees. I suggest that any doubt you have concerning your status could best be resolved by your filing of an appropriate petition with the National Labor Relations Board.
>
> Please call me if you have any questions. [Emphasis supplied.]

After receiving Cureton's november 29 letter, the Union made no effort to contact the Employer for further negotiations, and no further bargaining sessions were held.

The General Counsel argues that the Employer's wage proposal contained in Cureton's October 5 letter remained a valid offer which the Union could accept, as it did, during its ratification meeting of November 3. The General Counsel theorizes that Thomas' advice, on November 2, to Cureton that the new minimum wage law had been signed and her request for the Employer to submit a proposal based on it, did not affect the viability of the Employer's October 5 wage offer. Additionally, the General Counsel asserts that the record contains no evidence of any conditions imposed by the Employer upon its October 5 offer.

The Employer contends, in effect, that no valid wage offer existed after November 1 because of the intervention of the FLSA amendments and, also, that there was no mutuality of agreement upon the terms ratified by the union membership.

The question presented is whether there is a contract between the parties. If one existed by virtue of the Union's ratification and subsequent oral and written

advice to the Employer to that effect, then the General Counsel should prevail. *H. J. Heinz Company* v. *N.L.R.B.*, 311 U.S. 514 (1941). If not, then this allegation fails. The Board has no authority to order an Employer to execute a contract to which it has not assented. *H. K. Porter Co., Inc., etc.* v. *N.L.R.B.*, 397 U.S. 99 (1970).

I find that there was no effective contract. Resolution of the issue depends upon analysis of the critical November 2 telephone conversation between Cureton and Thomas. During that conversation, Cureton told Thomas he would confirm the signing of the minimum wage law and give another proposal based on it. Accordingly, what was, to that point, an indisputably clear wage offer of October 5 became equivocal. Viewed in the context of the Employer's previously announced adamant position in opposition to culminating an agreement containing wage reopeners, I conclude that there was no wage proposal from the Employer in existence on the date the membership voted on the contract. Thomas had full knowledge that what was presented to the membership was incomplete in substantial and material terms; namely, wages. At best, what was presented to the membership on November 3 was a wage proposal which could be effective only until January 1, 1978, the effective date of the new minimum wage law. It stretches credulity and imagination beyond reasonable bounds to hold that the Employer had intended its October 5 wage proposal to be fragmented in such a manner. It is clear that the Employer had intended its proposal to settle the wage issue for the duration of the contract. Based on the Employer's position throughout earlier negotiations, only the operation of the FLSA amendments after a contract had been signed would have subjected wages to further negotiations. The Union's actions seeking the Employer's signature after the wage law had been signed was not an acceptance within the terms of the Employer's proposal (offer). In contract formation, there must be a valid offer and acceptance, since these are necessary in order that mutual assent may exist, "[a]n offer must be definite and certain" (17 Am. Jur. 2d 368.) "until the offer is accepted both parties have not assented, or, in the figurative language frequently used by the courts, their minds have not met." (17 Am. Jur. 2d 378.) "The rule is fundamental that an acceptance must comply with the terms of the offer—that is, in order to form a contract, the offer and acceptance must express assent to one and the same thing, and there must be no substantial or material variance between them." (17 Am. Jur. 2d 400.)

The Board consistently finds the parties must come to a meeting of the minds before it will impose an obligation to sign collective-bargaining agreements. *Sunshine Hotels Limited d/b/a Outrigger-Maui*, 226 NLRB 31 (1976); *Georgia Roofing & Sheetmetal Company*, 217 NLRB 115 (1975); *Printing Industries of Northern California*, 204 NLRB 329, 332 (1973), and cases cited therein.

On facts strikingly similar and analogous to the instant case, the Board affirmed a trial examiner's conclusion that an employer did not refuse to bargain by failing to sign a contract in *Service Equipment Company*, 198 NLRB 266, 268 (1972). There, the employer's proposal was based, in relevant part, upon the expiration of a wage freeze (imposed by the Federal Government) by a certain date. The Employer in *Service Equipment* was confronted with a union's "acceptance" of the employer's offer which had been made subject to resolution of the then-existing legal impediments to operation of the contemplated contract provisions. The employer contended it required further study of the Federal Wage Regulations. The trial examiner concluded that the employer was entitled to consider the full impact of the Federal regulations upon the proposal. Apparently, the request for time to undertake such consideration was deemed to be sufficient to find that no valid offer existed. I find that the *Service Equipment* case buttresses my conclusion that there was no wage offer pending upon which the Union could act on November 3.

Assuming, *arguendo*, that a valid offer existed, I nonetheless find the Union's ratification to be an ineffective acceptance. The only evidence presented before me to show what was presented to the union membership is the totality of the Employer's October 5 wage proposal. That proposal covered terms for a 3-year period. As a result of the Cureton-Thomas November 2 telephone conversation, it is eminently clear that only the portion of the October 5 offer providing wages up to January 1, 1978, was amenable to acceptance. Despite this, the employees apparently voted on what they thought was a 3-year arrangement. Indisputably, this situation created a substantial variation between the offer and acceptance. As seen from the above-cited authorities, the acceptance must be in the identical terms of the offer. Thus, the ratification vote is negated as a valid acceptance.

In making my conclusions herein, I have also considered the precipitous nature of the Union's actions. However, I do not attach to them the sinister significance suggested by the Employer. I have not based any of my conclusions thereon. I conclude the Union's failure to apprise the Employer of the pending ratification meeting and its timing to be irrelevant and recriminatory. Tactics of recrimination do not comprise a valid defense to allegations to unfair labor practices. *Anderson Lithograph Company, Inc. and Jeffries Banknote Company*, 124 NLRB 920 (1959). No recourse to those activities is necessary because I simply find that other facts demonstrate no contract existed.

Based upon all the foregoing, I conclude that the record does not establish the requisite elements of a contract by a preponderance of the evidence. Thus, I find the allegations of paragraph 7(b) of the complaint have no merit.[11]

3. Withdrawal of recognition

The Employer by Cureton's November 29 letter withdrew recognition from the Union. This was 3 days after the end of the certification year. The withdrawal is alleged to constitute an unlawful refusal to bargain in violation of Section 8(a)(5) of the Act in paragraph 7(c) of the complaint.

[11] In view of this finding, and the reasons for it, I consider it unnecessary to assess the Employer's contention that its wage offer was void *ab initio*.

The applicable legal principles have been accurately summarized in the General Counsel's brief. The General Counsel contends that the Union's certification creates a presumption of a continuing majority status. It is acknowledged this presumption is rebuttable under the rationale of *Terrell Machine Company*, 173 NLRB 1480, 1480–81 (1969). Thus, in *Terrell*, the Board stated:

> It is well settled that a certified union, upon expiration of the first year following its certification, enjoys the rebuttable presumption that its majority representative status continues. This presumption is designed to promote stability in collective bargaining relationships without impairing the free choice of employees. Accordingly, once the presumption is shown to be operative, a *prima facie* case is established that an employer is obligated to bargain and that its refusal to do so would be unlawful. The *prima facie* case may be rebutted if the employer affirmatively establishes either (1) that at the time of the refusal the Union, in fact, no longer enjoyed majority representative status; or (2) that the employer's refusal was predicated on a good-faith and reasonably grounded doubt of the union's continued majority status. As to the second of these, i.e., "good faith doubt," two prerequisites for sustaining the defense are that the asserted doubt must be based on objective considerations and it must not have been advanced for the purpose of gaining time in which to undermine the Union.

These rules were reaffirmed by the Board in *Dalewood Rehabilitation Hospital, Inc., d/b/a Golden State rehabilitation Convalescent Center*, 224 NLRB 1618 (1976).

The Employer herein contends it had a good-faith doubt of the Union's majority status. The Employer argues it has established such doubt by undisputed evidence in the form of Cureton's November 29 letter. I disagree.

In salient part, that letter asserts[12] that the Employer received a "petition" in which a substantial number of employees signified their desire to no longer be represented by the Union. Additionally, the letter contains Cureton's assertion that the "petition" is signed by a majority of the unit employees. The enclosures to Cureton's letter purportedly contain the signatures of a majority of unit employees who signify their desire to be no longer represented by the Union. Although the letter was offered in evidence by the General Counsel, and was received, no party produced the enclosures (the "petition") during the course of the hearing.

Instead, 7 days after receipt of the Employer's brief,[13] I received a motion to reopen record, dated October 19, 1978, from the Employer's counsel. That motion prays the record be reopened to receive the enclosures to Cureton's November 29, 1977, letter. The bases of the motion may be summarized as a mistake and an inadvertence. On October 27, I issued an order to show cause why the Employer's motion should not be granted. Timely responses and oppositions to the motion were filed by counsel for the General Counsel and for the Union.

The motion to reopen the record is hereby denied for the following reasons.

The Employer must establish, on the basis of objective facts, it had a reasonable doubt as to the Union's continuing majority status. The burden of presenting such facts rests upon the party desiring to rebut the presumption of continuing majority. *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962 (1970), enforcement denied 470 F.2d 669 (9th Cir.) The assertion of doubt must be "supported by a showing of objective considerations providing reasonable grounds for a belief that a majority of employees no longer desire Union representation." *Nu-Southern Dyeing & Finishing, Inc., and Henderson Combing Co.*, 179 NLRB 573 (1969), and cases cited therein. The evidence of doubt must be "clear and convincing." *Ref-Chem Company and El Paso Products Co., Individually and as Co-Employer*, 169 NLRB 376 (1968). The test of whether an Employer has met its burden of proof "requires more than mere evidence of the Employer's subjective state of mind." *Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel*, 229 NLRB 1094 (1977), and cases cited therein.

Viewed in a posture most favorable to the Employer, Cureton's November 29 letter contains but self-serving declarations. The above-cited authority makes it clear that the General Counsel is not obligated to refute the accuracy of the conclusions set forth by Cureton; namely, that the "petition" expressed sentiment from a majority of employees against representation by the Union. The burden of proof squarely is upon the Employer.

The lesson derived from the above cases creates an obligation upon me to adjudge the parties' rights and obligations independently of the private preceptions of those parties. I would be giving mere perfunctory attention to the issue if I were to attach dispositive probative weight to Cureton's unchallenged conclusions. My analysis would be shallow and unfounded.

The motion to reopen the record is designed to provide the predicate by which I might fulfill my analytical imperative to assess the validity of the Employer's asserted good-faith doubt of the Union's majority standing. Seemingly, the Employer is prejudiced by the failure to have its proffered evidence contained in the record for consideration. My careful deliberation, however, results in a contrary conclusion.

In its motion, the Employer cites decisional precedent for the proposition that motions of this type have been granted. I find those cases distinguishable and inapposite. Thus, in *Mademoiselle Shoppe, Inc.*, 199 NLRB 983, 984 (1972), a motion to reopen was granted to cure an apparent procedural aspect of the rejection of a certain exhibit offered at the hearing. Herein, the record does not at all reflect the documents in question were intended to be offered in evidence. In *International Brotherhood Electrical Workers, AFL-CIO, Local 648 (Foothill Electrical Corporation)*, 182 NLRB 66, 69 (1970), a record was reopened to receive an exhibit which was explanatory in nature.

[12] See full text of the letter, *supra*.

[13] The hearing closed on July 14, 1978. Briefs initially were due on August 17. The due date was subsequently extended to September 29 and later to October 16.

Thus, the post-hearing offer simply supplemented the evidence already received. Additionally, the *IBEW* case clearly showed an intention to have offered the late received evidence during the hearing. In *Vangas, Inc., d/b/a Tahoe Vangas*, 209 NLRB 961, fn. 1 (1974), the reopening was to receive in evidence portions of an affidavit read into the record at the hearing. This post-hearing evidence was to clarify the transcript. The record was reopened in *Bricklayers Local Union No. 1* to receive an exhibit identified during the hearing but inadvertently not offered. Finally, in *Ruttmann Construction Company, etc.*, 191 NLRB 701, fn. 4 (1971), evidence was received after the hearing closed for the purpose of clarification. In *Ruttmann*, the evidence was received without objection from the Board's General Counsel.

If granted, the present motion would not clarify evidence already submitted by the Employer in support of its burden to show the Union lacked majority support. The motion does not rectify any inadvertence apparent on the record. I find no support in the record for saying that the Employer signified an intention to adduce the evidence now sought to be proffered. Thus, the instant matter does not fall within the category of cases in which post-hearing evidence was received to cure an inadvertence.

In effect, what is sought by the Employer is an opportunity to produce substantive evidence to sustain its burden of proof of the defense. The documents offered are ingredients of the Employer's *prima facie* case. As such, I find disposition of the motion is more aptly governed by that line of cases which, in essence, bind litigants by their conduct at the hearing, and by those cases which interpret Section 102.48(d)(1) of the Board's Rules and Regulations, Series 8, as amended.

Recently, the Board observed, in *California Pacific Signs, Inc.*, 233 NLRB 450 (1977):

> Section 102.48(d)(1) . . . permits a party to a Board proceeding, because of extraordinary circumstances, to move for a reopening of the record. It further provides, however, that only newly discovered evidence, evidence which has become available since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing. . . .

There is no contention before me that the evidence the Employer wishes to introduce was not available during the course of the hearing. Indeed, the record shows without doubt that it was available at all times, and even had been in the Employer's possession. Thus, there is no justification for reopening the record based on the first stated condition of "newly discovered evidence."

Similarly, there is no foundation to receive the post-hearing evidence herein pursuant to the condition that it constitutes "evidence which the Board believes should have been taken at the hearing . . . ." In making this conclusion, I have considered two things. First, as already noted, the record contains no discourse or argument by which the Employer signified any intention to offer the exhibits now proffered. It could have insisted that the General Counsel offer the enclosures at the time he offered the November 29 letter—but did not do so. Later, in presentation of the Employer's defense evidence, there is no hint of anything on which it now could be concluded the "petition" should have been taken at the hearing. Moreover, the elapsed time between the close of the hearing and mailing of the motion to reopen—slightly over 3 months—manifestly supports an inference that the Employer had not intended to offer them prior to the hearing's close. In this chronological context, it would be folly for me to conclude there is a valid basis for concluding the proffered evidence "should have been taken at the hearing." It is clear, in any event, that the second condition permitting reopening relates to factual situations attendant in cases such as *Bricklayers Local Union No. 1, supra.*

In *General Mercantile & Hardware Co.*, 191 NLRB 20, fn. 1 (1971), the Board said:

> [T]here is no explanation offered as to why such documents were not available at the time of hearing. Accordingly, absent a showing that these documents are newly discovered or previously unavailable evidence . . . [the Board denied the respondent's motion to reopen the record to receive its business records].[14]

I have considered the Employer's attempt to explain why the "petition" had not been offered, but find it unpersuasive. The Employer contends in an off-the-record conversation the General Counsel said he did not have the "petition" in his possession, but assumed responsibility for later furnishing the documents. In opposing the instant motion, the General Counsel disputes the accuracy of this assertion. I find it unnecessary to resolve this dispute because it is clear that the Employer took no action to make its assertion until long after having received its copy of the official transcript. In any event, even if the General Counsel did say what is ascribed to him, that fact does not relieve the Employer of its burden of proof. Inasmuch as the General Counsel's alleged commitment is supposed to have been made before the introduction of the November 29 letter in evidence, the Employer had more than ample time to take corrective action.

Upon all the foregoing, I find no legally compelling reason to grant the Employer's motion to reopen record.[15]

Having denied the motion to reopen, on the state of this record, I conclude that there is in evidence but a bare, unsupported opinion of the Union's loss of majority status. The evidence, specifically, is Cureton's November 29 letter (G.C. Exh. 15). In my view, this evidence is not sufficiently competent or probative to establish that any employee was opposed to representation by the Union.[16]

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[14] For similar ruling, see *Richard, Robin and Colin Williams, copartners d/b/a Williams Brothers Asphalt Paving Company*, 126 NLRB 388, fn. 1 (1960); *Armcor Industries, Inc.*, 217 NLRB 358, fn. 3 (1975).

[15] The Employer's motion to reopen record, the General Counsel's opposition, and the Union's opposition are hereby received in evidence as Emp. Exh. 35, G.C. Exh. 69, and Union Exh. 1, respectively.

[16] There is no evidence that any representation petition was filed after the end of the certification year. Even if one had been filed, that fact would have little probative value. *United States Gypsum Company*, 157 NLRB 652 (1966).

Upon all the foregoing, I find there is insufficient evidence to show that the withdrawal of recognition was based on the requisite objective considerations to relieve the Employer of its recognitional duties. Accordingly, I find the presumption of continuing majority has not been rebutted by the Employer and, by having withdrawn recognition, the Employer violated Section 8(a)(5) and (1) of the Act as alleged.[17]

Assuming, *arguendo*, I were to have granted the motion to reopen and received the "petition" into evidence, my ultimate conclusions and finding of a violation based on the withdrawal of recognition would be unaffected. The petition, standing alone (or when supported by Cureton's opinion stated in his November 29 letter) is not sufficiently probative to demonstrate that the Union lost its majority status. First, the signatures on the "petition" have not been authenticated. This defect might be cured by reopening the record for additional evidence. However, no useful purpose would be served by that undertaking. I shall find, *infra*, that the Employer did not accord all the former strikers their full rights as economic strikers. Those findings entitle certain strikers, not all of whom are presently identifiable (as will be shown hereinbelow), to be considered as unit employees when recognition was withdrawn.[18] Thus, the discriminatees are to be counted in computation of the numerical size of the unit. Without a precise count indicating unit size, it would be virtually impossible to declare the signatures presented in the "petition" (even if fully authenticated) comprise a majority of unit employees. There simply would exist herein no numerical standard against which the Employer's proof can be tested.

C. *The Discrimination*

In paragraph 5 of the complaint, as amended at the hearing, it is alleged that the Employer discriminated against the strikers in a variety of ways. Thus, paragraphs 5(b) and (c) as amended allege that the Employer failed to reinstate 51 named economic strikers[19] after the Union submitted its July 29 unconditional offer to return to work on their behalf. Thirty-nine of the alleged discriminatees held prestrike positions as nurses. The other 12 strikers formerly were employed in a variety of other departments.

Additionally, paragraph 5(d) of the complaint alleges that the Employer unlawfully failed to rehire certain named strikers. Further, it is alleged in subparagraph (e) that W. L. Cronin was constructively discharged on or about August 27, in subparagraph (f) that M. J. Holmes unlawfully was denied vacation and/or sick days in early April, in subparagraph (g) that R. Dickman was discriminatorily denied vacation days in September, and in subparagraph (h) that D. Stephens was improperly assigned to more arduous work.[20]

These allegations will be considered *seriatum*.

Ambrose testified regarding recall procedures. I fully credit him in this regard because he appeared direct and forthright, was corroborated by documentary evidence, and because the General Counsel apparently has accepted Ambrose's description of those procedures. Ambrose testified that within a few days after receiving the strikers' offer to return to work he consulted with the Employer's attorney. It was arranged between them[21] to establish a recall list. The list contained the names of all strikers, separately arranged by their prestrike job, ranking them in seniority order. Ambrose personally implemented the recall procedure. Health Services Supervisor Lemaire advised him of specific job requirements. If an immediate replacement was needed, Ambrose telephoned the strikers on the recall list in the order in which they appeared. If the need to fill a vacancy was not urgent, Ambrose wrote letters offering recall in the same order and would wait for a response. If a striker responding to a recall notice advised Ambrose of some inability to accept the position offered but desired to be maintained on the recall list, Ambrose honored such requests. Those strikers who did not at all respond to recall letters were removed from the recall list. Those strikers who told Ambrose during the course of telephone calls that they did not wish to return to work for the Employer, also, were removed from the list. When Ambrose could not communicate with a striker by telephone because her phone was not answered when he called, he maintained that striker's name on the list. Additionally, Ambrose kept those strikers on the list who told him they needed more notice to report or when they advised they could not report for any other reason but still desired reinstatement.

When the recall list was exhausted by Ambrose, the nursing staff was hired by Lemaire who had performed this function prior to the inception of the recall list. Lemaire credibly, and without contradiction, testified that she had no formal hiring procedures. She stated that openings commonly occurred suddenly. Because of this, she virtually hired the first available applicant who may have been on the Employer's premises at the time a vacancy arose. If there were no applicants present, Lemaire referred to a file containing approximately 60 applications. Lemaire then telephoned those applicants. If the first or second effort to call such applicants failed, Lemaire destroyed the application.

Numerous employees testified as to what occurred to them during the operation of the recall list. I find the composite of their testimony substantially corrborates the above-described procedures.

1. The general refusal to recall—complaint paragraphs 5(b) and (c)

As noted, the Employer's contention that those individuals hired during the strike were permanent replacements for strikers is unchallenged. Also, it is undisputed the strikers are to be considered economic strikers.

[17] See *Peoples Gas System, Inc.*, 238 NLRB 1008 (1978).

[18] *Pacific Tile and Porcelain Company*, 137 NLRB 1358, 1365-66 (1962); *Sioux City Brewing Company*, 85 NLRB 1164, 1166 (1949).

[19] The economic character of the strike is unrefuted.

[20] The discriminatees named in pars. 5(e) to (h) are also named in subpar. (b).

[21] The Union was not involved.

The parties are in agreement upon the basic legal principles governing the rights of the strikers in this case. Under *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970), case economic strikers who make an unconditional application are entitled to reinstatement to their former or substantially equivalent jobs even if they had been replaced, and that right requires the employer to seek out the former striker to give the striker priority over new applicants for any comparable job that opens by virtue of the replacement's departure. This right to reinstatement is not without limit. Thus, the entitlement exists "unless they [the strikers] have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons." 171 NLRB at 1369–70.

As to the nursing staff, the General Counsel propounds several theories of violation. In sum, those theories attack the propriety of the Employer's operation of the recall list.

a. *Licensed practical nurses and general practical nurses*

Five licensed practical nurses and two general practical nurses were employed when the strike started. All went on strike. None of these yet had been recalled by the hearing date.

The Employer defends its failure to recall LPNs and GPNs on economic grounds. Specifically, the Employer contends those positions had been eliminated as a result of a change in the Employer's operations. Accordingly, the Employer urges that it satisfied its burden to show a substantial and legitimate justification for its failure to offer reinstatement (*N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967)), to those striker classifications. The General Counsel argues that defense is a sham and that, in any event, the LPNs and GPNs should have been recalled to "any available job for which the striker is qualified. . . ."

Ambrose became the Employer's administrator on February 1, 1977. Around that time the Employer's board of directors decided to decertify its operation as "skilled" and convert it entirely to an "intermediate" care facility. Whereas "skilled" operation required licensed nursing personnel in constant attendance and nurses aides cannot administer medication, the "intermediate" type operation does not require the presence of licensed nurses and medication may be administered by aides.

On January 27, Cureton wrote Thomas advising the Employer was considering elimination of the skilled care operation. He indicated that "would mean the elimination of two LPN positions. . . ." Cureton requested negotiations with the Union concerning this matter. Correspondence in evidence reveals that the Union opposed such a plan.[22] On March 1, the Employer officially decertified itself as a skilled care facility. Also in evidence is a series of correspondence between Ambrose and the Indiana State Board of Health. These documents confirm Ambrose's testimony regarding the Employer's intention to alter its operations. Some of the correspondence indicates that personnel other than LPNs and GPNs would be required to undergo a training course before certification for administering medication. Additionally, those individuals taking the course were required to pass a test provided by the State. That test was administered to approximately 10 employees on November 19.

There is no evidence that any LPN or GPN had been laid off prior to the strike. Implementation of the March 1 decertification was delayed because the Employer had received a notice of picketing pursuant to Section 8(g) of the Act. Presumably, during the strike charge aides substituted for absent licensed personnel. It is undenied that after the strike, also, charge aides were permitted to administer medication in violation of the state law which, apparently, was not strictly enforced.

The General Counsel implicitly contends that the Employer penalized the striking LPNs and GPNs for having gone on strike. The General Counsel observes that the implementation of the decision to operate as an intermediate care facility was not instituted until after the strike. He ignores the unrefuted testimony of Ambrose that the delay was caused by receipt of the Section 8(g) notice. He, in effect, urges I should discount the Employer's defense because it is unreasonable to believe that the Employer would continue to flaunt the state law unless such action was motivated by an intent unlawful under the Act.

Under other circumstances, I would agree with the General Counsel. However, there are two factors herein which lead me to conclude that the Employer has proved its economic defense. First, it appears that the Employer achieved financial savings from its change to an intermediate care facility. Thus, Ambrose testified that charge aides receive 15 to 25 cents an hour less wages than the licensed personnel. The General Counsel argues that Ambrose's failure to provide a specific difference in wages renders his testimony unreliable. I disagree, for it is clear that Ambrose's uncontradicted testimony shows it cost the Employer less to operate with unlicensed personnel (charge aides). The General Counsel's argument that the Employer failed to fulfill its evidentiary burden by not producing specific documentary evidence of the exact cost differential between licensed and unlicensed personnel is misplaced. No one sought to, or did, contradict Ambrose's oral testimonial assertions. Second, the facts show that the use of unlicensed personnel to administer medications did not start after the strike. The evidence reveals that the charge aides substituted for LPNs during the strike. Thus, I conclude this substitution was a necessary expedient to maintain the Employer's operations throughout the strike. Therefore, the poststrike implementation of the decision to become an intermediate care facility cannot be said to have occurred in retaliation for the employees having exercised their statutory rights.

[22] There is no allegation in the instant complaint that the change from skilled to intermediate care constituted an unlawful refusal to bargain.

Finally, Ambrose testified that the failure to recall LPNs, who admittedly were qualified to perform the work of aides, had been attempted unsuccessfully by the Employer in the past. According to Ambrose, that earlier effort resulted in poor employee morale, principally because the LPNs were required to work at lower than normal pay.

Upon all the foregoing, I conclude that the Employer has sustained its burden of proving a substantial business justification for its failure to recall the LPNs and GPNs.

The General Counsel impliedly suggests that the Employer's discriminatory motive is shown by its delay in implementation of the decision to operate as an intermediate care facility. I find no merit to this contention. The documentary evidence amply demonstrates that the Employer decided to change its operations several months before the strike. It afforded the Union an opportunity to negotiate upon that subject matter. The Union expressed opposition. However, there is no evidence whether the ensuing collective-bargaining sessions considered this subject. To infer an unlawful motivation from this context simply because of the interjection of the strike distorts the background events. Thus, I find that the record as a whole supports the Employer's economic defense to the failure to recall LPNs and GPNs.

b. *Nurses aides*

Thirty-two of the discriminatees alleged in paragraph 5(b) of the complaint held prestrike positions as charge aides or nurses aides.[23] The nursing staff operates on three regular shifts: 7 a.m. to 3:30 p.m. (day shift); 3 to 11:30 p.m. (evening shift); and 11 p.m. to 7:30 a.m. (midnight or night shift). There are both full-and part-time employees assigned to these shifts. Historically, new employees on the nursing staff are hired as on-call employees. They are customarily informed that they will be reassigned to part-time and ultimately to full-time positions if they choose, as vacancies arise. This commitment was also made to the strike replacements when they were hired.

The parties stipulated that certain documentary evidence (G.C. Exhs. 65 and 65-a) contains the work history of those employees working when the strike began, during the strike and subsequent to it, as that history is reflected on the Employer's official records.[24] The stipulated abstract confirms Ambrose's testimony that he began to recall strikers almost as soon as he received the guidelines from the Employer's counsel. Ambrose testified that the first striker recalled was Dorothy McCallister. Her name appears first on the recall list for nursing staff. Ambrose testified that McCallister had been recalled to her former position. I accept his testimony. No controverting evidence was adduced. Although the record does not reflect the exact date of McCallister's recall, I conclude it occurred on or before August 4. On August 4, the stipulated abstract reveals that the second striker, Justine McMahon, on the nursing recall list was returned to work as a full-time nurses aide on the evening shift. Additionally, on January 8, 1978, McMahon became a charge aide on the same shift. Prior to the strike, McMahon was a charge aide on the same shift.

As to the aides, the General Counsel expounds several theories of violation. He contends strikers recalled to on-call or part-time positions were not provided jobs substantially equivalent to those held prior to the strike. This contention applies also to strikers who formerly had been charge aides, but who were recalled to nurses aides positions after the strike. The General Counsel argues that openings for the above categories of strikers occurred in their former positions before the offer of a different job was made to them. The stipulated abstract shows this is true.

However, the General Counsel's argument is but superficially appealing. It is the General Counsel's burden to show that a striker's former job was available (*Greenville Cotton Oil Company*, 92 NLRB 1033, 1034 (1950)). The fallacy in the General Counsel's theory is that it presumes absolutely no striker-aide had been returned to her former position. Ambrose's testimony and the stipulated abstract show otherwise. I have already noted the uncontradicted testimony that McCallister was returned to her old job. Thereafter, the stipulated abstract shows recalls were made by seniority as vacancies occurred in any available position. (This apparently is what the General Counsel claims should have been done.)

As an example of the General Counsel's proposition, he contends that V. Rudolph's recall was unlawfully delayed. She was recalled on October 1 to an on-call position, part-time on the day shift. When the strike began, Rudolph was a regular part-time employee. The stipulated abstract shows that some vacancies occurred as a result of the termination of replacements and returned strikers. The returned strikers had more seniority than Rudolph. (Compare Rudolph to W. Cronin and N. Harpeneau.) Comparison of the seniority dates of other nursing employees not recalled precisely to their prestrike jobs shows that their recall was in proper order of relative seniority. The stipulated abstract, however, does not permit a determination of which vacancy each such striker filled. The most the stipulated abstract demonstrates is that vacancies occurred from time to time after the strike ended.

The state of the instant record persuades me that the General Counsel has not sustained his burden of showing a particular vacancy existed for the yet unrecalled strikers. The General Counsel did not produce specific evidence that at the strike's end any aide's position was then available. My examination of the stipulated abstract leads me to conclude that, generally speaking, vacancies in nursing jobs were filled by available strikers from the recall list in accordance with Ambrose's description of how he operated the recall procedure.

Accordingly, I find the record does not demonstrate by a preponderance of evidence that the Employer discriminated against strikers by recalling them to positions other than those held prior to the strike or by delaying their recall offers.

This finding does not resolve the allegations regarding discrimination against the nurses aides. The General

[23] For purposes of this Decision these terms are used synonymously.

[24] G.C. Exhs. 65 and 65-a will hereafter be called the "stipulated abstract."

Counsel contends that the Employer discriminated against strikers by implementation of the longstanding commitment made to new employees (and also made to the strike replacements) to move them from on-call to part-time and/or full-time positions as they became available. Examination of the stipulated abstract shows no replacement had been transferred pursuant to that hiring promise between the end of the strike and January 18, 1978. On that date strike replacement, Carol Goffinet, hired during the strike as an aide, evening shift, full time, was transferred to a day-shift full-time position.

Goffinet's transfer on January 18, 1978, demonstrates that the Employer indeed implemented its policy of granting preference to striker replacements. The list of unrecalled striker-aides (G.C. Exh. 57) shows two aides, C. Jones and M. Criss, not yet reinstated as of July 10, 1978. At least they, and perhaps unidentified other striker-aides, were available for recall on the date of Goffinet's transfer. The strikers' rights under *Laidlaw* have no time limitation upon them. In *Brooks Research & Manufacturing, Inc.*, 202 NLRB 634, 636-637 (1973), the Board noted:

> We likewise reject the Respondent's contention that a time limit should be placed on the reinstatement rights of economic strikers. Not only is such a time limit contrary to the principles enunciated in *Fleetwood* and *Laidlaw*, the alleged burden upon an employer is neither onerous nor severe.

In *Brooks Research*, the Board noted that the Fifth Circuit Court of Appeals also rejected an employer's contention that a time limit should be placed upon the reinstatement rights of economic strikers. In *American Machinery Corporation* v. *N.L.R.B.*, 424 F.2d 1321, 1327 (5th Cir. 1970), the court stated:

> We are not impressed with [respondent's] protestation that the difficulty in seeking out strikers "several months" or "five years" after their application for reinstatement, when a replacement leaves, justifies its conduct.

Accordingly, I conclude that nurses aides C. Jones and M. Criss and any other unrecalled striker-aide similarly situated on January 18, 1978, are entitled to preferential hiring rights.

The Employer, citing *H. & F. Binch Company*, 188 NLRB 720 (1971), by analogy urges that the instant commitment to striker replacements they would ascend from on-call to part-time to full-time positions is tantamount to the preference permitted a replacement in the situation where the agreement to hire is made before the former encumbent striker unconditionally offers to return to work. I disagree. The attempted equation ignores a very real factual distinction. In situations where the preferences have been allowed, the job offered the replacement actually is vacant concurrent with the agreement to hire. In the case at bar, the Employer's transfer commitment was made for jobs not yet available. Preferences of the latter type are unlawful (*United Aircraft Corporation (Pratt & Whitney Division)*, 192 NLRB 382 (1971)). Thus, I conclude that the *H. & F. Binch* case is inapposite.

In my opinion it is inherently destructive of strikers reinstatement rights to accord striker replacements preference to future job openings in positions for which qualified strikers remain available. Where an employer's discriminatory conduct is "inherently destructive" of important employee rights, no proof of antiunion motivation is needed to find an unfair labor practice. *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). Accordingly, I find that by transferring Carol Goffinet from full-time evening shift to full-time day shift on January 18, 1978, at a time there were at least two striker-aides yet awaiting reinstatement, the Employer violated Section 8(a)(3) and (1) of the Act.

My analysis of the stipulated abstract reveals that between October 18 and December 7 at least five individuals (Barbara Billow, Janice Lee, Denise Mullen, Sherry Hyde, and Geraldine Middleton) were hired as nurses aides. All, except Billow who was assigned to a midnight shift, full-time position, were given on-call positions when hired. All were transferred into other positions as aides at various times between November 9 and March 15, 1978. The records of these five individuals show they have no previous employment history with the Employer. Thus, they are so-called new hires.

As already indicated there were striker-aides not yet recalled on the dates these five employees were hired. The record is silent as to why it was necessary to employ new hires when the recall list was still operative.

I conceive of no more glaring example of discrimination so foreseeably causing employee response in contravention of Section 7 rights as to obviate the need for any other proof of intent than to afford new hires employment opportunities superior to those of strikers awaiting recall. Such disparate treatment is unlawful. It patently discourages union activity. *The Radio Officers' Union of the Commercial Telegraphers Union, AFL [A.H. Bull Steamship Company]* v. *N.L.R.B.*, 347 U.S. 17 (1954); *N.L.R.B.* v. *Erie Resistor Corp., et al.*, 373 U.S. 221 (1963).

Accordingly, I find the Employer violated Section 8(a)(3) and (1) of the Act by hiring new employees as aides and by transferring them into various aide positions at a time when all striker-aides had not yet been reinstated.

Finally, the evidence shows three new hires (K. Alvey in housekeeping department and Edith Hemfling and Patsy Faucett as aides) who started work between the date of the strikers' unconditional offer to return to work and the date (August 4) the record shows the first former strikers (McCallister and McMahon) were recalled. No evidence was adduced to show the employment strikers' unconditional offer. If such evidence had been presented I could conceivably find that the hire of Alvey, Hemfling, and Faucett are within the purview of *H. & F. Binch, supra*. Because I perceive the Employer's obligation to reinstate strikers began when they made their unconditional application to return, I find the Em-

ployer violated Section 8(a)(3) and (1) by giving preference to these three new hires.[25]

As noted, the General Counsel contends that the Employer violated the Act by having failed to afford the strikers sufficient time in which to respond to their offers of recall. I have considered the evidence which demonstrates the Employer has an obvious need for round-the-clock staffing for patient care, the numbers of strikers who had no difficulty responding in the time allotted, and the Employer's policy of keeping the strikers on the recall list whenever they indicated they had insufficient time to report. These factors, considered in the absence of independent evidence that the time limits were imposed to defeat the strikers' rights (cf. *Murray Products, Inc.*, 228 NLRB 268 (1977)), lead me to conclude, as I do, that there was nothing unlawful in the Employer's conduct in this regard.

2. Other categories of alleged discrimination

In paragraph 5(b) there are alleged two maintenance employees, two laundry employees, one social service employee, one dietary employee, one physical therapy aide, and five housekeeping employees as discriminatees.

a. *Maintenance*

There were two maintenance employees, R. Alvey and N. Holpp, employed in the maintenance department. Both of them engaged in the strike and had not been recalled to work. It is undisputed that they were replaced by J. Tindall (hired May 2) and M. Chenault (hired May 4). Tindall was still employed at the time of the hearing. Chenault was laid off on or about March 22, 1978. It is undisputed that Tindall and Chenault were permanent strike replacements.

The Employer defends its failure to reinstate Alvey and Holpp to the job vacated by Chenault on economic grounds. Ambrose testified that in early 1978 he reviewed the duties of the maintenance employees and suggested the elimination of one maintenance position to the Employer's board of directors. This testimony is supported by documentary evidence. Ambrose received the requested approval and, consequently, Chenault was laid off.

One of the documents submitted by Ambrose (G.C. Exh. 59) contains an analysis of the Employer's cost of Chenault's employment. It shows that during the course of his employment he had already been paid $7,106.83. This figure, adjusted to an annual basis, equaled $9,536.77. That document also indicates that work contracted out amounted to $240 annually. Ambrose testified he based his recommendation to eliminate one maintenance position upon his judgment that all necessary inside maintenance work could be performed by one person. According to him this would be a significant savings to the Employer. No evidence was presented to reflect that Chenault's departure had an adverse impact upon the Employer's maintenance functions. Also, no evidence was adduced reflecting the Employer engaged nonemployee contractors to perform maintenance work other than that reflected by the $240 sum.

The General Counsel contends that the financial evidence provided by Ambrose is contradicted by other evidence showing that the maintenance personnel "consistently" worked overtime. The General Counsel's reliance on the overtime documents is misplaced. Scrutiny of those records clearly shows that the overtime was performed during winter months in years when the weather conditions were severe. I do not agree with General Counsel this proves the consistency he asserts. Thus, I do not find the overtime records in evidence so probative or reliable as to discredit Ambrose. Similarly, I discount a notation on Chenault's timecard which states: "Employee was laid off due to lack of work. Employee will be recalled if workload picks up." This notation, the General Counsel contends, contradicts the Employer's assertion that one maintenance position had been permanently eliminated. During his testimony, Ambrose conceded that the authority to lay off one maintenance employee was experimental and conditioned upon his ability to properly function with only one maintenance employee. In this context, I regard the timecard notation to be nothing more than a reflection of the authority granted to Ambrose.

Viewing all the relevant evidence regarding the maintenance position in its totality, I am persuaded that the Employer has sustained its burden of meeting the *Fleetwood* test of substantial business considerations in its failure to recall Alvey and Holpp.

The General Counsel's brief does not specifically address itself to the laundry, dietary, housekeeping, and physical therapy discriminatees. He relies, instead, on the various theories of violation discussed, *supra*, in connection with the nurses aides.

b. *Laundry department*

When testifying, Ambrose acknowledged that employee O. Hearth was transferred to the laundry department on October 12. He said this was at the employee's request. Hearth was transferred from the dietary department. No other evidence of poststrike vacancies in the laundry department was presented.

The only other evidence relating to the laundry is contained in an October 20 letter from Thomas to Cureton. In that letter, Thomas complained that Hearth's transfer was unlawful. By letter dated October 31, Cureton responded to Thomas' charges stating, "when the opening in laundry arose, Hearth voluntarily and on her on initiative requested the transfer. This worked out very well because another employee on two weeks sick leave returned to work about the same time. The returning employee Helen Farmer, did not fill Hearth's vacancy. Concurrently, we [the Employer] were able to increase the number of hours worked of two other kitchen employees, both of whom were former strikers." Further, Cureton denied the Employer violated the Act by transferring Hearth.

[25] The record does not reveal, with precision, which strikers are affected by any of my findings of 8(a)(3) violations. This is a matter which can be resolved by subsequent compliance proceedings if the parties are unable to reach voluntary agreement. *American Machinery Corporation*, 174 NLRB 130, 135 (1969).

On the above facts, I conclude it is clear that, when the employee whose place Hearth had taken terminated her employment, there was created a vacancy in the laundry department. At that time strikers C. Kratzer, C. Bybee, and L. Hagerdon had not yet been recalled to their former dietary department jobs. Although there is no evidence that Hearth is a strike replacement I find her transfer to the laundry department is analogous to the unlawful preference, found above, accorded striker replacements and reflects unlawful disparate treatment. *The Radio Officers' Union* v. *N.L.R.B., supra.*

Accordingly, I find that by Hearth's transfer on October 12, to the laundry department the Employer violated Section 8(a)(3) and (1) of the Act.[26]

c. *Social services*

The Employer's brief argues there was no discrimination regarding this department. The original complaint contained the name of L. D. Jones. The records in evidence reveal that Jones was recalled to her prestrike position on August 22. At the hearing, the General Counsel moved to strike Jones' name from the complaint. I granted this motion. Accordingly, no further discussion of this matter is necessary.

d. *Dietary department*

J. Covetts is the only dietary department employee against whom the Employer is alleged to have discriminated of the six dietary employees who struck. Covetts testified that she was an assistant cook on the day shift prior to the strike. She testified she was recalled as a part-time cook's helper on August 29, on split shift working from 7 to 11 in the morning and 3 to 7:30 in the evening. Two weeks after her recall she was returned to her prestrike shift. After her recall she was paid $2.35 per hour, the same rate she received prior to the strike.

The General Counsel contends this employee had not been returned to her former job and that the position to which she was recalled was not substantially equivalent. Ambrose testified, in effect, that Covetts misdescribed the job title to which she had been recalled. He testified there are only the classifications of cook and cook's helper in the dietary department. I credit this testimony. Thus, I find no difference between the job titles of "assistant cook" described by Covetts and "Cook helper" described by Ambrose. Additionally, Covetts testified that she performed substantially the same work after, as before, the strike. Covetts testified that she was aware her former position was not available at her recall. It was apparently held by a striker replacement. The records reveal that Covetts was the first striker returned to work after the strike in the dietary department. Thereafter, she quit and apparently was replaced by another striker.

Based on the foregoing, I conclude that Covetts was reinstated to a substantially equivalent position of employment. She received her prestrike wage rate and performed work virtually identical with that performed before the strike. I place little probative significance upon her identification of her prestrike position as "assistant" cook. Both she and Ambrose agree that her poststrike classification was "helper." This latter classification is consistent with the official designation by the Employer. Thus, I consider the General Counsel's efforts to distinguish Covetts' prestrike job from that to which she was recalled to be shallow. While Covetts was the third employee on the recall list, it appears she was the first dietary striker who had been actually reinstated.[27]

Based upon the foregoing, I find that the Employer did not discriminate against J. Covetts in the manner asserted by the General Counsel.

e. *Physical therapy aide*

The original complaint alleged that two physical therapy aides, M. Criss and B. P. Nugent, were not reinstated after the strike.

Ambrose testified, without contradiction, that at the end of the strike one opening occurred in the physical therapy department. Nugent was recalled to it. (The General Counsel moved to strike Nugent's name from the complaint. I granted this motion.)

Ambrose further testified that since Nugent's recall the physical therapy department operated with her together with strike replacement Moore.

The General Counsel conceded at the hearing that no physical therapy job was available since the strike ended. However, the General Counsel asserts that M. Criss should have been recalled to any available job. Apparently, this theory is based on the fact that M. Criss was initially employed in September 1975 by the Employer as a nurses aide. Thus, she possessed qualifications to perform work in the nursing department. In view of my earlier findings that the Employer did not discriminate against the striker-nurses aides and, in general, properly implemented the recall list I find no merit to the General Counsel's contentions. Therefore, as it appears that no job as a physical therapy aide was available after the strike to which Criss was entitled, I find no merit to this aspect of the complaint.

f. *Activities director*

The original complaint alleged two activities directors, R. A. Sprinkle and J. Clark, as having been refused reinstatement. During the hearing, I granted the General Counsel's motion to strike Sprinkle's name from the complaint.

In mutual corroboration of one another, Ambrose and Clark testified that in April Ambrose advised Clark that one of the then existing two activities directors positions

[26] This finding is not diminished by the fact that the evidence reveals the Employer recalled striker H. Howe to the laundry department on October 11. In making this finding of violation in the laundry department, I have considered Ambrose's testimony that when Hearth was transferred the dietary department was overstaffed. Thus, presumably no vacancy existed. However, dietary overtime was increased by 7-1/2 hours per employee who remained in that department. Each such employee worked 77.5 hours per pay period. In this context, considering overtime rates normally exceed straight time pay, it is reasonable to assume a vacancy was indeed a feasible (if not desirable) method of filling the void created by Hearth's transfer. I am not impressed by the Employer's observation that there had already been two former strikers recalled to the dietary department.

[27] Covetts' case buttresses my conclusions, *supra*, that the Employer operated the recall list in a nondiscriminatory manner.

was being eliminated. Ambrose then offered to transfer Clark to a nurses aide position. She told him she was available only for the day shift. Ambrose, therefore, permitted Clark to remain in her activities director position until such time as a day-shift aide position became available. He cautioned however, in writing, dated April 15 (G.C. Exh. 21) that he "cannot, and will not, keep" her in the activities position "forever." Clark worked as activities director from that date until the April 29 strike. On May 4, L. Hagerty was hired as a permanent replacement for the activities director position. Hagerty has worked continuously in that job until the hearing dates.

Clark's name was placed on the recall list for physical therapy aide. According to Ambrose, whom I credit in this regard, the failure to place Clark's name on the recall list for the nursing department was an inadvertence. Although the Union had been provided the recall list, it did not bring this omission to the Employer's attention. During the Board's investigation of the charges herein this error was brought to the Employer's attention. The Employer took corrective action. Clark's name was then placed on the nurses aides recall list.

On January 31, 1978, Ambrose wrote Clark offering her a nurses aide position beginning February 15. Clark responded by telephone on February 7, 1978, rejecting the recall offer because it was to the night shift. On February 7, Ambrose wrote Clark confirming their telephone conversation. In this letter Ambrose told Clark she would be retained on the recall list pursuant to her request which indicated she desired to be further considered for a day-shift position. On February 8, Ambrose again wrote Clark advising her that "on reflection" he had removed her name from the recall list.

During her testimony, Clark stated that she "may have" told other people she had no intention of returning to work for the Employer.

Clark's case presents a close question. Though not explicitly argued by him, the General Counsel's theory apparently is predicated upon a claimed right to reinstatement to a nurses aide job. Whether or not this is true, I find the facts indicate but a single activities director's position was in existence immediately prior to, during, and after the strike. Thus, Clark's job classification was in limbo. In these circumstances, it is understandable that Clark's name did not initially appear on the nurses recall list.

It is problematical whether the Employer was obligated to put Clark's name on the nurses recall list or to consider her for employment in such a position. Nonetheless, the Employer voluntarily chose to do so in January 1978. I view this act as having made operative the *Laidlaw* principles as regards Clark. Indeed, the Employer signified its intention to accord her those rights when it considered her for reemployment as it signified in Ambrose's January 31 letter.

Ambrose's February 7 letter is evidence of the Employer's consistency in implementing the recall procedures. However, without offering a reason for his "reflection," Ambrose repudiated his own recall procedures when he precipitously wrote Clark on February 8 that she had been removed from the recall list. This reversal occurred but one day following that on which Ambrose wrote Clark she remained on the list for consideration for reinstatement. No explanation was offered for Ambrose's last action.

As observed *supra*, an economic striker's right to reinstatement exists for an indeterminate period (*Brooks Research & Manufacturing, Inc., supra*). In my view, the unexplained abrupt removal of Clark's name from the recall list signals to employees a derogation of their rights. Although I have noted the uncertainty of whether Clark was entitled to be considered for a nurses aide position in the first instance, on balance, the rights of employees to reinstatement after having engaged in an economic strike are superior to those which may be asserted by the Employer in connection with Clark's situation. Accordingly, I find that, by removing Clark's name from the recall list on February 8, the Employer violated Section 8(a)(1) of the Act.

As previously indicated, the record does not reveal with specificity whether a nurses aide position to which Clark might have been entitled by virtue of her seniority became vacant on and after February 8, 1978. Accordingly, and consistent with my earlier findings, I find the General Counsel has not sustained his burden of proving that Clark had been discriminated against in violation of Section 8(a)(3) of the Act.

g. *Housekeeping department*

All seven individuals employed in the housekeeping department went on strike. Housekeeping-striker R. Dickman was recalled on August 27. However, as noted hereinabove, new hire K. Alvey was improperly hired on August 2. I have found that preference to be unlawful. Ambrose's testimony, the stipulated abstract and related documents in evidence show that subsequent housekeeping vacancies were offered to the strikers on the housekeeping recall list in seniority order.

Based on earlier discussions and findings within this Decision, I conclude now that the Employer did not discriminate against any housekeeping employee because of its failure to recall any of them to work. However, because Alvey's hiring was unlawful, it is clear the offers of reinstatement to Dickman and the other below her on the recall list was discriminatory. If preference had not been given Alvey then each of the housekeeping employees on the recall list would have been entitled to earlier recall. Accordingly, I find that by according Alvey employment preference over the housekeeping employees on the recall list, Respondent violated Section 8(a)(3) and (1) of the Act.

In effect, paragraphs 5(d) to (h) set forth alternative theories of discrimination allegedly practiced against specific strikers whose names also appear in the complaint paragraph 5(b). These remaining subparagraphs of the complaint are considered below.

3. The failure to rehire—complaint paragraph 5(d)

J. K. Morris: Morris was a full-time day-shift nurses aide before the strike. On September 6, she was recalled, worked the midnight shift for 2 days and then was transferred to a part-time day-shift position. She asked Lemaire for a full-time position but was told there were no

openings. On October 17, she resigned, in writing, "for better pay." In February 1978 Morris returned to the Employer's premises and advised Ambrose she was working elsewhere but was unhappy. Morris asked Ambrose for a job. Ambrose told her there were no openings but he would keep her in mind. Morris did not file a new application for employment at that time.

The foregoing facts show that Morris voluntarily quit her job in October 1977. There is no evidence that action was other than voluntary. Thus, I conclude that Morris abandoned her position and her rights to further consideration for employment as an economic striker. *P.B.R. Company*, 216 NLRB 602, 603 (1975); *Beverage-Air Company*, 185 NLRB 168, 170 (1970). Accordingly, I find no merit to this aspect of complaint paragraph 5(d). This finding, however, does not diminish any rights to which Morris may accede as a result of my findings of violation regarding complaint paragraphs 5(b) and (c).

V. J. Rudolph: Rudolph was recalled as a nurses aide, returning to work approximately October 1. She worked until January 1978 when she told Lemaire that she could work no longer because of poor weather conditions and she no longer had a ride to work. There is some evidence that Rudolph returned in May 1978 and requested a housekeeping job. Apparently, the General Counsel's theory is based on the failure to offer Rudolph such a position. I conclude that when Rudolph resigned in January she relinquished her rights as an economic striker. (See *P.B.R. Company* and *Beverage-Air Company, supra.*) Accordingly, I find no merit to this aspect of complaint paragraph 5(d).

These findings as to Rudolph do not affect any rights she may have by virtue of the unfair labor practice findings made relative to complaint paragraphs 5(b) and (c).

R. J. Brown: Ambrose wrote her on September 16, confirming a telephone conversation where he offered her recall. Brown told him she was working elsewhere. Brown testified that in the spring of 1978 the state unemployment authorities referred her to the instant Employer for a housekeeping position. She testified she completed an employment application but Lemaire testified it could not be located. Lemaire testified further that she called Brown twice. Apparently, in accordance with Lemaire's practice, Brown's application had then been destroyed.

I find it unnecessary to consider either the propriety of destroying the employment application or to determine whether the Employer actually made an effort to offer a housekeeping job to Brown. I conclude the facts reveal that she abandoned her rights as an economic striker when she advised Ambrose in September that she had obtained employment elsewhere. (*P.B.R. Company* and *Beverage-Air Company, supra.*) Accordingly, I find no merit to this aspect of complaint paragraph 5(d). However, inasmuch as R. J. Brown held a prestrike job as nurses aide, this finding should not affect any rights she has by virtue of my unfair labor practice findings as to complaint paragraphs 5(b) and (c).

P. G. Boyer: When the strike started Boyer was a full-time GPN on the day shift. In October she spoke to Ambrose and asked for a job. He told her none was available, but he would contact her if one became vacant. In November, Boyer asked Lemaire for any available position but was told there were none.

On April 27, 1978, Ambrose wrote Boyer that he was in the process of updating the Employer's records. He asked whether she was still interested in employment should a vacancy arise in her "former job or a substantially equivalent position." Boyer responded, in writing, that she was willing to return to work, adding "as soon as I am released from my doctor's care I would love to come to work." Boyer advised she just had another child and requested her job be held if any openings occur. Boyer testified that on June 26, 1978, she telephoned Ambrose and told him she had been released from her maternity care. Boyer has not been recalled to work.

I find nothing in the above narration to alter my earlier findings and conclusions that the failure to recall GPNs was not discriminatory. No evidence was adduced to show that any GPN had been hired after the strike. Also, there is no evidence to reveal that a GPN vacancy existed after the strike. Thus, I attribute the failure to reinstate Boyer to the Employer's decision to become an intermediate care facility. Accordingly, I find this aspect of Complaint paragraph 5(d) without merit.

G. Cox: Cox was a full-time nurses aide on the midnight shift before the strike. She was recalled to an on-call position on September 6. At that time she was employed elsewhere. Cox did not respond to her recall letter. Therefore, Ambrose removed her name from the recall list.

During the last week in December, Cox returned to the Employer's facility and completed an employment application. Lemaire then advised Cox that the Employer was "not hiring." Cox started another job on February 6, 1978. In the interim, however, Cox testified that in January 1978 she visited the Employer's premises a "dozen times." Cox insisted she went to the Employer's premises three or four times a week during January. Lemaire denies that Cox visited the nursing home with the frequency she claimed. In fact, there were extremely severe winter weather conditions in existence—so much so that Lemaire remained on the Employer's premises for 2 weeks. Also, only motor vehicles with four-wheel drive could traverse the snow conditions. Despite this, I find it unnecessary to resolve the testimonial conflict between Cox and Lemaire.

It is unquestioned that Cox did not respond to her September recall notice. Ambrose waited a full week after the requested reporting date for a response. At that time, I conclude he reasonably could assume she had abandoned her rights as an economic striker; particularly inasmuch as she was employed at some other location. Accordingly, I find no merit to this aspect of complaint paragraph 5(d).

R. J. Morris (Goffinet): Before the strike, this striker was employed as a full-time nurses aide. She was recalled by Ambrose on or about September 16, and told him that she could not return to work because she was employed at Burger King. Ambrose wrote her, on September 16, advising she was being removed from the recall list.

Although the following remark attributed by Morris-Goffinet to Ambrose appears in the striker's oral testimony, it is not alleged as an independent violation of Section 8(a)(1). According to Morris-Goffinet, in November she appeared at the Employer's premises. She completed an employment application and gave it to Ambrose who told her if there were any openings he would contact her. During this conversation, Morris-Goffinet testified that Ambrose asked her if she walked off the job when the strike started. Ambrose denied he made this remark. I credit Ambrose. It is illogical and unlikely Ambrose would have uttered the comment ascribed to him because she had already been identified as a striker. Her name had been on the recall list. Ambrose recalled her in writing. They had a conversation concerning her new employment. All this indisputedly occurred in September. It is implausible to believe that in November he would have had any question concerning her status as a striker. In an atmosphere, as herein, otherwise free of examples of interference, restraint, or coercion I regard it as irresponsible to give credence to Morris-Goffinet's testimony regarding Ambrose's potentially unlawful comment, especially where the complaint contains no such allegation and the General Counsel did not seek to amend the complaint to add it.

Upon all the foregoing, I find that, when Morris-Goffinet told Ambrose she could not return to work because she was otherwise employed, she effectively relinquished her rights as an economic striker.

R. Brock: When the strike started, Brock was employed as a full-time nurses aide on the day shift. On August 25, she was recalled to the day shift as a nurses aide. She worked there but 2 days and was then transferred to a part-time position on the day shift. Brock testified that, on or about September 1, she wrote Lemaire a note requesting to be returned to a full-time position. Having received no affirmative response, Brock quit on October 3.

Sometime in January, February, or March[28] Brock visited the Employer's facility along with her stepmother, Virginia Kieser. Brock was referred to the Employer by the state unemployment compensation authorities. Brock and Kieser completed employment application forms. Brock was interviewed by Lemaire. Lemaire testified she asked Brock whether she was looking for a job and Brock responded, "[N]ot really. They [the unemployment compensation authorities] sent me in." Brock denied she made this statement. I find it unnecessary to resolve this conflict. There is no evidence that when Brock quit in October she had obtained any other employment. The fact she was referred to the Employer by the unemployment authorities shows that she had not yet acquired the regular and substantially equivalent employment required by *Laidlaw* so that it could be said an economic striker relinquishes her right to reinstatement. In these circumstances, I find Brock was entitled to consideration for employment as a nurses aide in 1978, notwithstanding the possibility she may have told Lemaire she was not "really" interested in one. The fact is no job had been offered to Brock. In this connection, I note that the Employer's records reflect that Kieser, a new hire, was employed as a nurses aide on March 24, 1978. Kieser worked only 1 day. Nevertheless, Kieser's employment shows that a nurses aide position was available. Lemaire testified that she could not locate Brock's application. In accordance with Lemaire's previously described employment procedures, I am asked to infer that Brock had been called to be offered a position. Although I do not discredit Lemaire's account of her employment practices, in the circumstances surrounding the applications of Kieser and Brock and Kieser's hiring, I am unwilling to draw that inference. Accordingly, I find there is no evidence that Brock had been offered any position in 1978. As noted, Brock had been recalled on August 25, 1977. Apparently, then, she possessed sufficient seniority for immediate recall to an available position. Kieser's employment shows such a vacancy actually existed, albeit in 1978.

Upon all the foregoing, I conclude the failure to recall Brock to at least the position which was offered Kieser constitutes a violation of Section 8(a)(3) and (1) of the Act. I have previously noted my inability to ascertain whether nurses aide positions earlier became vacant such as would have entitled Brock to earlier recall. If, of course, such vacancies may be found to have existed then I would find Brock had been discriminated against at that earlier date because I find that her resignation in October, in the circumstances herein, does not constitute an effective waiver of her rights as an economic striker. Based on the above, I find merit to this aspect of the complaint paragraph 5(d).

4. The constructive discharge—complaint paragraph 5(e)

Striker W. Cronin was employed as a nurses aide, full time on the day shift when the strike started. She was recalled as a part-time nurses aide on the day shift. At her recall, Cronin was pregnant. She pulled a muscle while working. Her attending physician, in writing, restricted her from lifting. The record reflects that nurses aides were required to perform lifting services when moving patients. Cronin presented her doctor's restrictive note to Lemaire. Cronin, in generalized testimony, testified that Lemaire told her to take maternity leave. Lemaire's version is different. Lemaire said she told Cronin there were no jobs which did not require lifting. According to Lemaire, it was Cronin who requested to be placed on maternity leave.

I credit Lemaire. Her testimony throughout the proceeding was candid, forthright, and precise. While I do not generally discredit Cronin, her version of the conversation with Lemaire was considerably less specific. Accordingly, I conclude it was at Cronin's instigation that she was placed on maternity leave. Thus, I find that the record does not contain a preponderance of credible evidence to support the General Counsel's theory that W. Cronin was constructively discharged. There is no merit to complaint paragraph 5(e).

[28] It is unnecessary to determine the precise date.

5. Denial of vacation and/or sick benefits—complaint paragraphs 5(f) and (g)

M. J. Holmes (complaint par. 5(f)): Holmes was reinstated in late August. She worked until April 1978. Holmes testified she resigned because one of the Employer's office clericals, L. Hogeland, told her she had to make up her time on strike before she could receive her vacation or sick benefits. Hogeland did not testify.

The Employer's benefit policy is contained in a written document (G.C. Exh. 64). That document provides that vacations are granted to employees "with the Company for 1 full year." Sick days are accumulated in a similar way. Ambrose testified that the Employer's policy is to compute an employee's service based on actual work. He also testified that if an employee is sick, management makes a case-by-case appraisal of whether the sick time should be credited as worktime. Accordingly, Ambrose admitted that returning strikers "had to make up the time they were off before they were eligible for vacation."

As to Holmes, the Employer relies on the undisputed fact that she quit her employment without notice. The Employer asserts its personnel policies require "sufficient notice" from employees who resign. Indeed, such a provision is contained on page 10 of General Counsel's Exhibit 64. From this, the Employer argues that Holmes was entitled to no accured benefits because she indisputably quit without notice.

R. Dickman (complaint par. 5(g)): Dickman, a reinstated striker-aide, requested vacation time in the middle of September 1977. She was advised by "some girls in the office" she had to make up her time off on strike before she could take a vacation. The Employer admittedly credited her with only approximately 8 months work from September 1976 to April 1977 (when the strike started). The Employer claims the denial of vacation time was appropriate because of the policy to credit employees for time worked. Dickman was still employed by the Employer at the time of the hearing. Ultimately, she received her full vacation entitlement.

It is well established that denial of benefits to employees because they engage in activities protected by the Act constitutes an unfair labor practice. The issue presented by the cases of M. J. Holmes and R. Dickman requires analysis of the Employer's motivation. Although neither Holmes nor Dickman identified any personnel who could bind management by the expressions which signified to those former strikers that they had to make up strike time in order to receive the benefits, I find Ambrose admitted that indeed was the Employer's position. The General Counsel's theory, in effect, requires me to infer a discriminatory intent from the absence of the explicit directives within the Employer's written personnel policies. Thus, the General Counsel would require the written policies to contain specific language warning the employees that absences from work might not be counted for purposes of accumulating qualifying time for their benefits. In other circumstances, I might agree with the General Counsel. Such agreement, however, would ignore the uncontroverted testimony by Ambrose of the Employer's past practice. The sum of Ambrose's testimony indicates that before the strike the Employer made separate decisions on whether to credit employees with time spent away from work due to illness. Also Ambrose's testimony reflects the withholding of payment for unused vacation time from employees who resigned without "sufficient notice" was a policy existing prior to the strike. In this context, I conclude the Employer's neglect to consider the strike time in the computation of benefit entitlement was not designed as a punitive measure against the strikers.

Accordingly, I find the General Counsel has not sustained his burden of proof by a preponderance of evidence as to complaint paragraphs 5(f) and (g).

6. Assignment of more arduous duties—complaint paragraph 5(h)

Striker *D. Stephens* was in her early stages of pregnancy at the time she was reinstated as a nurses aide. The General Counsel asserts that the failure to transfer Stephens to a work station requiring lighter work was discriminatory. Stephens was reinstated to her prestrike position.

Stephens testified that she told her charge aide and Barbara Jordan of her pregnancy. Jordan was identified by Stephens as director of nurses. (This identification is implicitly used by the General Counsel as proof that the Employer's management personnel were immediately aware of Stephen's condition.) Considerable evidence regarding Jordan's status when Stephens had been reinstated is in the record. My analysis of all relevant evidence in this connection leads me to conclude, as I do, that Jordan then possessed the title of consultant but possessed no supervisory indicia since she assumed that position. There is evidence that before February 1977 Jordan was a supervisor within the meaning of the Act. However, for purposes of the allegation regarding Stephens, Jordan's earlier status is irrelevant.

Stephens' work station involved heavy lifting. She testified that in the past, other pregnant employees had been transferred to lighter work stations. However, the General Counsel conceded Stephens did not complain about her job or physical condition after she returned to work.

At some unspecified date, Stephens was kicked in the stomach, apparently by a patient. Lemaire was not aware of Stephens pregnancy at the time of her reinstatement. However, Lemaire observed Stephens being kicked. The record is devoid of evidence regarding what next ensued between Stephens and Lemaire. However, what is clear is that Lemaire suggested to Stephens that she move to a different station. The record is uncertain whether Stephens' new station involved lighter work.

On the above facts, which show Stephens was recalled to precisely her former position and absolutely no indication that the Employer was aware of her pregnancy it is virtually impossible to charge the Employer with this violation. There is no independent evidence of hostility toward Stephens. The Employer was unaware of her physical condition. She did not request lighter work. Accordingly, I find no merit to complaint paragraph 5(h).

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for collective bargaining within the meaning of the Act:

> All service and maintenance employees, including licensed practical nurses, nurses aides, charge aides, orderlies, physical therapy aides, kitchen employees, activities employees, social designee, housekeeping employees, and laundry employees of the Employer at its Tell City, Indiana, facility excluding all office clerical employees, all professional employees, all registered nurses, director of nursing, assistant director of nursing, the dietary manager, all guards, and all supervisors as defined in the Act.

4. The Employer did not engage in surface bargaining.

5. The Employer did not violate Section 8(a)(5) when it refused to sign the "agreement" proffered on November 3, 1977.

6. The Employer failed to bargain collectively in good faith with the Union in violation of Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on November 29, 1977.

7. The Employer did not discriminate against employees when it recalled and reinstated them to other than their prestrike jobs.

8. The Employer did not unlawfully delay recall of strikers.

9. The Employer discriminated against employees in violation of Section 8(a)(3) and (1) of the Act by according job preference to strike replacments over former strikers.

10. The Employer discriminated against employees in violation of Section 8(a)(3) and (1) of the Act by hiring new employees as nurses aides and thereafter transferring them into aides positions at a time when not all striker-aides had yet been reinstated.

11. The Employer discriminated against employees in violation of Section 8(a)(3) and (1) of the Act by hiring new employees before recalling any strikers after they had made an unconditional application to return to work.

12. The Employer discriminated against employees in violation of Section 8(a)(3) and (1) of the Act by transferring Oma Hearth to a position in the laundry department.

13. By removing J. Clark's name from the recall list on February 8, 1978, the Employer interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act.[29]

14. By according employment preference to new hire K. Alvey over the housekeeping-strikers on the recall list, the Employer discriminated against employees in violation of Section 8(a)(3) and (1).

15. The Employer discriminated against R. Brock, in violation of Section 8(a)(3) and (1) of the Act, when it failed to offer her reinstatement on March 24, 1978.

16. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

17. The Employer did not violate the Act in any regard other than those found above.

THE REMEDY

Having found that the Employer violated Section 8(a)(1), (3), and (5) of the Act by certain conduct, I shall recommend it cease and desist from engaging in such conduct in the future and affirmatively take such action as will dissipate the effects of its unfair labor practices.

Because the Employer's November 29, 1977, withdrawal of recognition from the Union was unlawful, the Order shall require the Employer to cease and desist from refusing to recognize and bargain with the Union as the exclusive bargaining representative of the employees in the appropriate unit described above in paragraph 3 of the Conclusions of Law. The Order shall also require the Employer to recognize and, upon request, bargain collectively with the Union as the exclusive collective-bargaining representative of the appropriate unit, described above, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees, and, if an understanding is reached, embody such understanding in a signed agreement.

Because it has been found the Employer discriminated against certain individuals and groups of strikers, in violation of Section 8(a)(3), the recommended Order shall require the Employer to offer each striker against whom the Employer has been found to have discriminated immediate and full reinstatement to his or her former or substantially equivalent job, without prejudice to seniority or other rights and privileges, and to make each such striker whole for any loss of earnings suffered as a result of the discrimination by payment of a sum equal to that which he or she would have earned, absent the discrimination, from the date of the alleged discrimination (*Eagle International, Inc.*, 223 NLRB 29 (1976); *Murray Products, supra*), to the date of the Employer's offer of reinstatement, with backpay and interest computed in accordance with the Board's established standards contained in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[30]

The unlawful activities of the Employer, including the discriminatory refusals to reinstate the strikers and withdrawal of recognition from the Union, go to the very heart of the act and indicate a purpose to thwart the employees' rights. The unfair labor practices committed by the Employer are potentially related to other unfair labor practices proscribed by the Act, and the danger of their commission in the future is to be anticipated from the

[29] The facts supporting this conclusion were fully litigated at the hearing. Although the complaint contains no specific allegation of this independent violation of Sec. 8(a)(1), unpleaded but litigated issues support unfair labor practice findings. *New England Web, et al.*, 135 NLRB 1019 (1962), reversed on other grounds 309 F.2d 696 (1st Cir. 1962); *Thompson Manufacturing Co., Inc.*, 132 NLRB 1464 (1961); *Merchandiser Press, Inc.*, 115 NLRB 144 (1956).

[30] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Employer's conduct in the past. The preventive purposes of the Act will be thwarted unless the recommended Order herein is co-extensive with the threat. Accordingly, in order to make effective the interdependent guarantees of Section 7 and thus effectuate the policies of the Act, the Order herein shall require the Employer to cease and desist from in any other manner infringing upon the rights of employees guaranteed in the Act. *N.L.R.B.* v. *Express Publishing Company*, 312 U.S. 426 (1941); *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532 (4th Cir. 1941); *Pan American Exterminating Co., Inc.*, 206 NLRB 289, fn. 1 (1973).

Upon the above findings of fact, conclusions of law, the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[31]

The Respondent, Lincoln Hills Nursing Home, Inc.; Leaseholding Company; and Tell City Distributors, Tell City, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminating against employees by failing to accord them their reinstatement rights as economic strikers.

(b) Refusing to recognize and bargain with Chauffeurs, Teamsters and Helpers Local Union No. 215, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive collective-bargaining representative of the employees in the appropriate bargaining unit described below, with regard to wages, hours, working conditions, and other terms and conditions of employment. The unit is:

> All service and maintenance employees, including licensed practical nurses, nurses aides, charge aides, orderlies, physical therapy aides, kitchen employees, activities employees, social designee, housekeeping employees, and laundry employees who are employed at the Employer's Tell City, Indiana, facility, excluding all office clerical employees, all professional employees, all registered nurses, director of nursing, assistant director of nursing, the dietary manager, all guards, and all supervisors as defined in the Act.

(c) In any other manner interfering with, restraining, coercing, or discriminating against its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer each striker against whom the Employer has been found to have discriminated full and immediate reinstatement to his or her former job or, if that job no longer exists, to a substantially equivalent position of employment, without prejudice to his or her seniority or other rights and privileges, and make each such striker whole for any loss of pay suffered as a result of the discrimination against him or her in the manner set forth hereinabove in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination or copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful to a determination of the precise identity of the strikers against whom the discrimination was practiced and an analysis of the amount of backpay due and the right of reinstatement under the terms of this Order.

(c) Post at its Tell City, Indiana, facility copies of the attached notice marked "Appendix."[32] Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Recognize and, upon request, bargain collectively with Chauffeurs, Teamsters and Helpers Local Union No. 215, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative in the appropriate unit described above, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees and, if an understanding is reached, embody such understanding in a signed agreement.

(e) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that all allegations of the complaint which have been found to have no merit be dismissed.

[31] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[32] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."